United States Court of Appeals

for the Second Circuit

APPENDIX

74-1404

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

FRANK BERNARDINI,

Appellee,

vs.

REDERI A/B SATURNUS,

Appellant,

and

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Appellee.

UNITED STATES COURT OF APPEALS
FILED
JUN 17 1974
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Appeal from the United States District Court for the Southern District of New York.

JOINT APPENDIX

Volume I, pp. 1a - 375a

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DOCKET ENTRIES

CIVIL DOCKET

UNITED STATES DISTRICT COURT [illegible] JUDGE WARD

Jury demand date:

70 CIV. 3075

Form No. 106 Rev.

Pltff. 7-17-70
3rd Pty.Deft. Internatl. 2/16/71

TITLE OF CASE

ATTORNEYS

/12/71 Amended to read: FRANK BERNARDINI
~~FRANK BERNARDINI~~

VS

REDERI A/B SATURNUS
deft 3rd pty pltff

1-22-71 INTERNATIONAL TERMINAL OPERATING CO. INC.
3rd pty deft.

For plaintiff:
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For defendant:
HAIGHT GARDNER POOR & HAVENS
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New York 10004
James J. Griffin (for International Term.)
17 Battery Place NY 10004 269-2200

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
3. 5 mailed x	Clerk	[illegible]	[illegible]	[illegible]	[illegible]
3. 6 mailed ✓	Marshal	[illegible]	Haight G Poor &	✓	✓
sis of Action:	Docket fee				
Per. Inj. Longshoreman 75,000	Witness fees				
tion arose at:	Depositions				

JUDGE WARD JUDGE MOTLEY 70 CIV. 2075

Pg #

DATE	PROCEEDINGS	Date Order or Judgment Note
Jul 17-70	Filed complaint issued summons	
ug 12,70	Filed deft ANSWER to complaint.	
ug 12,70	Filed deft notice to take deposition of pltff on 9-4-70	HGP&H
ept.10-70	Filed summons with marshal's ret. Served Rederi A/B Saturnus c/o Norton Lilly & Co. by S.Spallina, Claims Agent for Norton Lilly & Co. as Agent on 7/27/70.	
ec.2-70	Filed Notice of Motion re: file 3rd pty.complaint.	
ec.2-70	Filed Deft's.Memorandum of Law in support of its motion to implead.	
c.15,70	Filed MEMO. END. on motion filed 12-2-70 There being no opposition the motion is granted. MacMahon J.	
an 22,71	Filed 3rd pty complaint and issued summons.	
eb.16-71	Filed ANSWER to 3rd pty. complaint and counterclaims., and jury demand.	JJG
eb.16,71	Filed summons with marshal's ret. Served International Terminal Operating Co. Inc. by Mr. Nolan on 2-2-71	.36
.17,71	Filed deft 3rd pty pltff, Reply to counterclaim of 3rd pty deft/	
b.24,71	Filed pltff's Reply to counterclaim of 3rd pty deft.	
r.12-71	Filed stipulation and order that all pleadings and summonses be amended to set forth the plaintiff as FRANK BERNARLINI, in place of Frank bernarline, and the caption of the action be amended accordingly. So ordered. Metzner,J.	
r.13-71	Filed Notice of Motion re: Dismiss Complaint (re: Interrogs.) Ret. 4/29/71.	HGP&H
r.13-71	Filed Memorandum of Law in support of deft. & 3rd pty.pltf's.motion.	
r.30-71	Filed MEMO.END. on motion papers filed 4/13/71. Motion consented to. No opposition. SUBMIT ORDER. Motley,J.	
ot 13 71	Filed pltff's NOTE OF ISSUE & statement of readiness.	
ot 13 71	Filed affidavit of J V Fleming in opposition to note of issue	
t.1-71	**Filed memo-endorsed on deft. & 3rd.pty.pltff's opposition to note of issue. Objections overruled by default, add case to trial calendar. So ordered. Bryan,J.**	
n.3-72	Filed order pursuant to calendar rules 6 & 13. Edelstein,CH.J.	
.20-72	Filed deft's & 3rd.pty.pltff's designation of trial counsel.	
11-72	FILED order that Alexander, ash, Schwartz & Cohen be and they hereby are substituted in and stead of James J. Griffin, as atys. of record for third party deft., Brieant,J.	
r 29.73	Filed Pre Trial Order. Ward J. (M/N) (Consented to)	
n 28.73	Filed Affidavit by Joseph T. Stearns in support of an application for an adjournment of trial to 7/2/73.	
n 28.73	Filed Afidavit of Engagement by Paul Klein.	
.25.73	Filed Pltff's request to charge.	
.25.73	Filed Deft.& 3rd pty pltff. Preliminary requests to charge jury.	
.25.73	Filed Deft.& 3rd pty pltff. additional requests to charge.	
.25.73	Filed 3rd pty deft. ITO Requests to charge.	
.25.73	Filed 3rd pty deft. additional requests to charge.	
t16	Trial begun (jury)	
17	" continued	
19	" "	
23	" "	
24	" " Verdict for Pltff vs 3rd pty defendant dismissed	
t 16-73	Trial begun (Jury)	
17-73	Trial continues Oct. 19-73- Trial continues	
23-73	Trial continued & concluded. Jury deliberating	
24-73	Jury deliberating. Jury returns with verdict (attached)	
	Motions pursuant to Rules 50 & 59 FRCP	
5.73	Filed Brief of Deft. & 3rd pty pltff., Rederi A/B Saturnus in support of its motion pursuant to rules 50 & 59 FRCP for Judgment notwithstanding the	

Civil 3075 Frank Bernarline vs. Rederi A/B Saturnus,

CIVIL DOCKET JUDGE WARD pg. #3

DATE	FILINGS-PROCEEDINGS
Nov.5.73	Filed Deft. & 3 pty Pltff. Notice of Motion. Re: Judgment ret. 11/20/73.
Nov.7.73	Filed Judgment #73,878. Ordered that pltff. have judgment against deft.A/B Saturnus in the amount of $10,000.00, & that 3rd pty complaint against 3rd pty deft. is dismissed. Clerk, Approved Ward J. Entered 11/8/73 (mailed notice)
Jan.8.74	Filed Deft. & 3rd pty pltff. Notice of Appeal. from judgment entered 11/7/74.(mailed notice)
Nov.16.73	Filed 3rd pty Defts. Memorandum of Law in opposition to 3rd pty pltffs. motion for Judgment N.O.V.
Nov.16.73	Filed Affidavit in opposition by Albert V. Testa to the deft. & 3rd pty. pltffs. motion for Judgment notwithstanding, etc.
Nov.20.73	Filed Transcript of proceeding dated 10/23/73.
Nov.27.73	Filed Affidavit in opposition to defts. motion by James David Auslander.
Dec.10.73	Filed Memo. End. on deft. & 3rd pyt pltff. motion dated 11/5/73. Motion denied, etc. Ward J. (mailed notice)
Dec.10.73	Filed Memorandum Decision Order. The Motion is in all respects denied of deft. & 3rd pty pltffs. motion. Ward J. (mailed notice)
Mar.26-74	Filed designation of true copy of missing originals to be transmitted to the U.S.C.A. in lieu of.
5-9-74	Filed transcript of record of proceedings, dated 10-16,17,19,23,24-1973

PRELIMINARY REQUESTS TO CHARGE OF DEFENDANT AND THIRD PARTY PLAINTIFF

(SAME TITLE)

PRELIMINARY REQUESTS TO CHARGE RESPECTFULLY SUBMITTED ON BEHALF OF DEFENDANT AND THIRD PARTY PLAINTIFF WITHOUT PREJUDICE TO THE FURTHER SUBMISSION OF ADDITIONAL REQUESTS AS MAY BE CALLED FOR BY THE TESTIMONY ADDUCED AT THE TRIAL:

1. A shipowner does not have the burden of an insurer and is not required to provide an accident-proof ship. Mitchell v. Trawler Racer, Inc., 362 U.S. 539.

2. The mere fact that an accident happened to the plaintiff does not make the shipowner liable to him. Mitchell v. Trawler Racer, Inc., 362 U.S. 539.

3. The burden of proof as to negligence of the shipowner or the unseaworthiness of the vessel is upon the plaintiff and if the plaintiff fails to sustain his burden of proof, then you must find for the defendant. Freitas v. Pacific-Atlantic Steamship Company, 218 F. 2d 562 (9 Cir., 1955); Manhat v. United States, 220 F. 2d 143 (2 Cir., 1955).

4. A vessel is seaworthy when the vessel and its appurtenances are reasonably fit for their intended use. The standard is not perfection, but reasonable fitness. Mitchell v. Trawler Racer, Inc., 362 U.S. 539.

5. The mere presence of a temporary condition on deck, does not, of itself, render a vessel unseaworthy. In order to find for plaintiff, you must also find that, because of the presence of such temporary condition, the vessel was not reasonably fit for its intended use. Blier v. United States Lines Company, 286 F. 2d 920 (2 Cir., 1961).

6. A finding of unseaworthiness of the vessel or negligence of defendant, without more, is not enough to hold defendant liable for damages. Its liability depends on whether the unseaworthiness or negligence was a proximate cause of injury. To be a proximate cause there must be a direct causal connection between the unseaworthiness or negligence and the injury. Blier v. United States Lines Company, 286 F. 2d 920 (2 Cir., 1971).

7. Any failure of the defendant and third party plaintiff to warn plaintiff about a condition of which he was aware or should have been aware would not be causally related to the injury. Rodriguez v. American Export Lines, Inc., 304 F. 2d 518 (2 Cir., 1962).

8. If you find that defendant was negligent or the vessel unseaworthy, you must then determine whether or not plaintiff himself failed to exercise that degree of care that a reasonably prudent man would have used under the same circumstances. If you find that he did not, then plaintiff was guilty of contributory negligence. Nicroli v.

Den Norske Afrika, 332 F. 2d 651 (2 Cir., 1964).

9. If you find that plaintiff knew, or in the exercise of reasonable diligence should have known of the presence of a patch of ice on the deck and, nevertheless, attempted to work in the area, then you should find that plaintiff was guilty of contributory negligence. Santo Marco v. United States, 227 F. 2d 255 (2 Cir., 1960); Nicroli v. Den Norske Afrika, 332 F. 2d 651 (2 Cir., 1964).

10. If you find that plaintiff's injury was caused solely by his own negligence, then plaintiff cannot recover against defendant and your verdict must be for the defendant. Pisano v. Benny Skou, 346 F. 2d 993 (2 Cir., 1965).

11. If you find that any witness deliberately falsified any part of his sworn testimony, you may disregard his entire testimony or so much of his testimony as you consider unworthy of belief. In this connection, you may consider testimony given at examinations before trial and prior statements given by witnesses.

12. As a matter of law, third party defendant, International Terminal Operating Co., Inc., warranted to the shipowner that the stevedoring operations aboard the vessel would be carried out in a proper and workmanlike manner. A breach of that warranty will entitle the shipowner to recover indemnity from International Terminal

Operating Co., Inc. Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124.

13. If you find that the vessel was unseaworthy and you find further that the negligence of the third party defendant, International Terminal Operating Co., Inc., created that unseaworthiness or brought it into play, then that would amount to a breach of the stevedore's warranty of workmanlike service and the shipowner would be entitled to indemnity from the stevedore. Crumady v. Joachim Hendrik Fisser, 358 U.S. 423 (1959).

14. If you find that the alleged spots of grease on the deck was known or should have been known to ITO through its employees, including the plaintiff, and that the stevedore nevertheless went ahead with these stevedoring operations, this would constitute a breach of the stevedore's warranty to the shipowner and render the stevedore liable for indemnity. Nicroli v. Den Norske Afrika, 332 F. 2d 651 (2 Cir., 1964).

15. The stevedore is obligated to comply with all Federal rules and regulations applicable to stevedoring operations. These regulations include the following taken from the Safety and Health Regulations for Longshoring, published by the United States Department of Labor:

> "Slippery conditions shall be eliminated as they occur."

Should you find initially in favor of plaintiff, then, you must also find that the stevedore breached its contract with the vessel owner by virtue of its failure to eliminate the slippery condition complained of by plaintiff.

16. The obligation owed by ITO to defendant shipowner to perform the work with reasonable safety related not only to the handling of the cargo but also to the use of all ship's equipment incident thereto. Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc., 355 U.S. 563 (1958); Puddu v. Royal Netherlands Steamship Co., 303 F. 2d 752 (1962); cert. denied 371 U.S. 870 (1962).

17. Any negligent conduct on the part of the third party defendant stevedore, ITO, which gives rise to liability on the part of the defendant shipowner to plaintiff would entitle defendant shipowner to recover indemnity from the third party defendant stevedore. DeGioia v. United States Lines, Co., 304 F. 2d 421 (2 Cir., 1962).

18. Any contributory negligence on the part of the plaintiff is itself a breach of warranty of workmanlike service on the part of ITO, his employer, and entitles the shipowner to indemnity from ITO. McLaughlin v. Trelleborgs Angfartygs A/B, 408 F. 2d 1334 cert. denied Golten Marine Co. v. Trelleborgs Angfartygs A/B 89 S. Ct. 2020, 395 U.S. 946.

19. The implied warranty of workmanlike performance requires stevedores to remove defects and dangerous conditions on vessels on which they are employed and generally to see that the longshoremen work under reasonably safe conditions. Misurella v. Isthmian Lines, Inc., 215 F. Supp. 857; Bertino v. Polish Ocean Line, 402 F. 2d 863.

20. Knowledge of the existence of a dangerous condition by a member of a stevedoring gang is imputed to its firm, and the firm's subsequent failure to act in a breach of the warranty. Drago v. A/S Inger, 305 F. 2d; Bertino, supra.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant
and Third Party Plaintiff
One State Street Plaza
New York, New York 10004

ADDITIONAL REQUESTS TO CHARGE OF DEFENDANT AND THIRD PARTY PLAINTIFF

(SAME TITLE)

DEFENDANT AND THIRD PARTY PLAINTIFF'S ADDITIONAL REQUESTS TO CHARGE

70 Civ. 3075

1. A longshoreman is not entitled to a deck that is free of all grease. Unseaworthiness exists only when the grease creates such a condition of slipperiness that the deck is no longer reasonably fit for its intended use. Rice v. Atlantic Gulf & Pacific Co., 2 Cir., October 9, 1973, Docket # 73-1151; Colon v. Trinidad Corporation, 188 F. Supp. 97 (S.D.N.Y. 1960).

2. The Safety and Health Regulations for Longshoring cannot place additional responsibilities or duties on shipowners or officers of vessels and are not relevant to the question whether the defendant shipowner was negligent or its vessel m/s Svensksund was seaworthy. However, the Safety and Health Regulations for Longshoring are relevant in considering the defendant, Shipowners claim against the stevedore, International Terminal Operating Co. Said International Terminal Operating Co. must comply with these regulations and a failure to comply is a breach by I.T.O. of its implied warranty that it would perform all stevedore work aboard the vessel, not just the physical loading or discharging of cargo, in a safe, prudent and workmanlike manner, free of negligence of any of its employees,

including plaintiff himself. Grigsby v. Costal Marine Service of Texas, Inc., 5 Cir. 1969, 412 F. 2d 1011.

3. In this connection I.T.O., through its employees and supervisory personnel, is charged with knowledge of any hazardous condition of which its employees, including the plaintiff, knew, or in the exercise of reasonable diligence should have known. Shenker v. United States, 322 F. 2d 622 (2 Cir., 1963).

Thus, the stevedore company, I.T.O. has a duty to remedy, or to have the ship's crew remedy dangerous conditions which exist for a period sufficient for stevedores to have constructive notice of such conditions, and I.T.O. supervisory personnel have the responsibility of making a reasonable if no more than cursory inspection of the work area, such as the deck area near the No. 4 hatch to determine if it is safe for its employees to work on. Vaccaro v. Alcoa S.S. Co. (2 Cir., 1969) 405 F. 2d 1133.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant
and Third Party Plaintiff
One State Street Plaza
New York, New York 10004

JUDGMENT #73,878 DATED OCTOBER 25, 1973 WITH ATTACHED SPECIAL VERDICT

(SAME TITLE)

70 Civil 3075 (RJW)

JUDGMENT

73,878

The issues in the above entitled action having been brought on regularly for trial before the Honorable Robert J. Ward, United States District Judge, and a jury on October 16, 17, 19, 23 and 24, 1973, and the Court having submitted the attached special verdict to the jury, and the jury having answered the said special verdict as indicated thereon, and the jury having returned the said special verdict in favor of the plaintiff, it is,

ORDERED, ADJUDGED AND DECREED, that plaintiff, FRANK BERNARDINI, have judgment against the defendant, REDERI A/B SATURNUS, in the amount of $10,000.00., and it is further,

ORDERED, that the third-party complaint against the third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., be and it hereby is dismissed.

Dated: New York, N. Y.
October 25, 1973

signed Raymond F. Burghardt
Clerk

APPROVED:

signed Robert J. Ward
United States District Judge

(SAME TITLE)

VERDICT

70 Civ. 3075

1. Has plaintiff, Frank Bernardini, established his claim that the S.S. Svenskund was in an unseaworthy condition and that this unseaworthiness was a proximate cause of plaintiff's accident? (Answer yes or no.) No.

2. Has plaintiff established his claim that the defendant, Rederi A/B Saturnus, was negligent and that its negligence was a proximate cause of the plaintiff's accident? (Answer yes or no.) Yes

3. If the answer to both questions 1 and 2 is "no" your verdict is for the defendant and you should put an "X" here and you should proceed directly to question 8.

_____

4. If the answer to either question 1 or 2 is "yes", what is the total dollar amount of damages to plaintiff?
$ 10,000.00

5. In the event you have found above that the plaintiff is entitled to recover, do you find that the defendant has established its claim that plaintiff was himself negligent and that his negligence was a proximate cause of the accident? (Answer yes or no.) No

6. If the answer to question 5 is "yes", what percentage did plaintiff's fault so contribute? --- %
(If the answer to question 5 is "no", do not answer this question.) If you entered a percentage on this question fill in its equivalent dollar amount here. $ ---

7. Subtract the dollar amount stated in answer to question 6 from the total amount of damages stated in the answer to question 4 and enter the difference here, which will be the net amount of damages you find the plaintiff is entitled to recover:

Question 4 total $ 10,000.00

Question 6 total $ ---

Net Recovery $ 10,000.00

8. Did the defendant establish its claim that third-party defendant, International Terminal Operating Co., Inc., breached its warranty of workmanlike performance? (Answer yes or no.) No.

NOTICE OF MOTION PURSUANT TO RULES 59(b) AND 59 DATED NOVEMBER 2, 1973

(SAME TITLE)

NOTICE OF MOTION

70 Civ. 3075 RJW

S I R S :

PLEASE TAKE NOTICE that the undersigned, upon the affidavit of Joseph T. Stearns, duly sworn to on the 2nd day of November, 1973, the pleadings and all prior proceedings had herein, will move this Court before the Honorable Robert J. Ward, to whom this case is assigned for all purposes, on the 20th day of November, 1973, at Room 1306 of the Federal Courthouse, Foley Square, New York at 2^{15} o'clock in the afternoon of that day or as soon thereafter as counsel may be heard, for an Order, pursuant to Rules 50 (b) and 59 of the Federal Rules of Civil Procedure, for judgment notwithstanding the verdict in plaintiff's favor against defendant; judgment notwithstanding the verdict in third-party defendant's favor in the case of the third-party plaintiff against third-party defendant for indemnity; and for a new trial upon all the issues of this case, and for such other or further relief as may be just in the premises.

Dated: New York, N. Y.
November 2, 1973

Yours, etc.,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant
and Third Party Plaintiff

By _____
A Member of the Firm

One State Street Plaza
New York, New York 10004

TO:

ZIMMERMAN & ZIMMERMAN, ESQS.
Attorneys for Plaintiff
160 Broadway
New York, N. Y.

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.
Attorneys for Third-Party Defendant
801 Second Avenue
New York, N. Y.

AFFIDAVIT OF JOSEPH T. STEARNS IN SUPPORT SWORN TO NOVEMBER 2, 1973

(SAME TITLE)

AFFIDAVIT

70 Civ. 3075
(RJW)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPH T. STEARNS, first being duly sworn, deposes and says:

1. I am an attorney-at-law associated with the firm of Haight, Gardner, Poor & Havens, attorneys for defendant and third party plaintiff; I am fully familiar with the pleadings and all prior proceedings had herein.

2. I submit this affidavit in support of defendant and third party plaintiff's motion for an order pursuant to Rule 50(b) FRCP for judgment notwithstanding the jury's verdict in plaintiff's favor and, alternatively, for judgment notwithstanding the verdict in favor of the third party defendant in the action for indemnity or, in the further alternative, for a new trial pursuant to Rule 59 on all the issues of the case.

3. Judgment notwithstanding the verdict obtained by plaintiff is sought on the grounds that the accident described by plaintiff is physically impossible in that he could not have sustained the claimed injury to the top of his right shoulder by striking it against the inshore coaming

of the vessel's No. 4 hatch, in the fall alleged. Judgment notwithstanding the verdict is sought, in the alternative, in the third party action since the jury's verdict adverse to the shipowner necessarily implied a jury finding of a breach of the mandatory "housekeeping" section of the Safety and Health Regulations for Longshoring, which, in view of the application of these regulations in the case of the action over, compels entry of judgment in defendant's favor against the third party defendant. A new trial is sought on all the issues presented because the verdict in plaintiff's favor was overwhelmingly against the weight of the credible evidence, if any credible evidence supporting plaintiff's contentions was given; because of the manifest injustice which the jury's verdict against the defendant represents; because of the inconsistancies of the jury's verdict in finding no unseaworthiness but that the shipowner was negligent; because the verdict was the result of passion or prejudice, and because of errors in the court's charge and in admission of evidence. On the latter point, the defendant and third party plaintiff contends that the Safety and Health Regulations for Longshoring were erroneously charged in plaintiff's case against the defendant; that it was error not to charge that a breach of the regulations entitled the third party plaintiff to indemnity from the stevedore-employer; and it was error not to charge that the stevedores had a duty to

inspect the work area, and because of the admission in evidence of the report of Dr. Magliato, and his identification by Dr. Graubard as the "impartial" medical examiner for the United States Department of Labor. Additionally, defendant urges that the evidence of plaintiff's contributory negligence, assuming that an accident occurred, was so overwhelming that the verdict to the contrary returned by the jury was wholly against the weight of evidence on this issue.

4. Plaintiff, a longshoreman who had been employed by the third party defendant for a matter of only minutes prior to his alleged accident, testified that he boarded the m/s Svensksund at Pier 21, Brooklyn, New York on October 28, 1969, and proceeded toward the No. 4 hatch to which he had been assigned. Since the vessel was moored starboard side to the pier, this meant that he made a left turn at the head of the gangway and walked through the midship house passageway towards the No. 4 hatch. Upon reaching the open deck adjacent to the No. 4 hatch he allegedly saw the man whom he recognized not to be a longshoreman who was standing either very near the aft bulkhead of the midship house or two feet from the head of the gangway. He passed this man and walked to the vessel's offshore side in the passage between the forward edge of the No. 4 coaming and the aft bulkhead of the midship house. He testified that he saw "nothing" in this passage. After reaching a point on the offshore side near

the forward, offshore corner of the hatch he asked a longshoreman who was re-rigging a boom where the coaming ladder was located. Allegedly he was told that this ladder was towards the inshore, aft corner of the hatch. He then allegedly walked in an aft direction, made an immediate left turn at the aft, offshore corner of the hatch and walked within one foot of the aft coaming the width of the hatch. He then made another left turn to a point (Y in the black-board diagram) two feet from this corner where he heard a "crackle" which he attributed to the tensing of one of the guys supporting the boom being rigged. He then stopped and after assuring himself it was safe to proceed, again walking forward on the inshore side of the vessel. He then began dodging grease spots on deck, on his tip-toes, slipped, fell forward, twisted, tripped on pallets laid down on the deck between the inshore coaming and the inshore rail, fell forward face down on the pallets yet nonetheless allegedly sustained an injury to the top of his right shoulder by striking it on the coaming which at the time of his accident was, of course, to his left.

5. Plaintiff could not verify whether or not the hatch had a coaming ladder because the coaming was 3' high or chest high and he could not look over it at the inshore forward coaming and see whether such a ladder was annexed to the four interior walls of the coaming. He testified

before seeing photographs marked in evidence as Defendant's Exhibits D1 through 7 that a so-called escape hatch ladder was a structure built onto the deck resembling a "bathroom hamper" with a lid top attached which flapped back. He testified that he did not see this ladder, which was located in the passage forward of the hatch at any time prior to his accident. Uncontradicted physical evidence also shows that when he said that he walked aft the hatch since the photographs, as well as the general arrangement plan (Defendant's Exhibit C) shows clearly that plaintiff must have walked to the very stern of the ship completely around the poop deck in order to have reached the place of his alleged accident.

6. Plaintiff was a holdman of 25 years experience. He easily described the appearance of an escape hatch ladder before being shown a picture of the escape hatch at the No. 4 hatch. He could have easily verified that there was no coaming ladder as Defendant's Exhibits D1 and D6 clearly demonstrate. Defendant's D1 shows a man in the background standing near the rail and Defendant's D6 shows another man standing near the aft inshore corner of the hatch. It is readily observed from these exhibits that plaintiff could have easily seen over the coaming and found out whether there was a ladder aft to the inside of the coaming. These photographs also show, particularly D1, that plaintiff must have

walked within inches of the escape hatch ladder while walking offshore forward of the hatch.

7. Plaintiff's uncorroborated testimony was so impeached by the physical arrangement of the vessel demonstrated by the exhibits that it cannot be of sufficient weight to support the jury's verdict in his favor. Moreover, there was evidence at trial shown again by the photographs, that there was a 4 or 5 inch overhang or flange on the coaming, which according to the testimony of Capt. Stahl and Capt. Wheeler and the initial testimony of the plaintiff, was between 3 and 4 feet high at the maximum. This means that if plaintiff walking forward on the inshore side with the coaming to his left and struck the top of his right shoulder against the coaming or against the overhang, he did so in a manner unknown to the experience of man since the accident described by him would have required him to slip, twist, lunge to his left and come up under the overhang which according to his testimony was chest high when the incident began, strike the top of his shoulder against the overhang twist again and fall forward face down on the pallets. This is, of course, physically impossible. Additionally, plaintiff's claim of both a slip and a trip is itself so fraught with inconsistancy as to be unworthy of belief, as was his addition to his testimony at his pre-trial deposition, i.e. that a boom had crackled prior to his accident.

Plaintiff's testimony was further impeached by the accident report (tripped on pallets); by his deposition (no mention of tripping) and his admitted failure to mention grease to anyone the day of his "accident".

8. The jury's verdict was the product of passion, misunderstanding, prejudice, and was arrived at in complete disregard of the physical facts presented to them. It appears that this jury could not accept the sinister implications of the plaintiff persisting in a fabrication, particularly since the Court took such obvious care to give no intimation to the jury of any opinion on plaintiff's factual claim. The mere fact that this case proceeded for the period of time which it did must have dignified plaintiff's claim in the eyes of the jury. Moreover, the Court's painstaking charge and the preparation of detailed questions led the jury to, possibly, have assumed that the issues could not be as simple as whether or not plaintiff in fact was, by perjury, attempting to obtain money for an injury sustained elsewhere.

9. The entire sense and character of the testimony given by plaintiff and the fact that it was totally uncorroborated, and was contradicted by the physical arrangement of the vessel, must lead this Court to the conclusion that a miscarriage of justice would result if the jury's verdict is allowed to stand.

10. Annexed to this affidavit as Exhibits are the seven photographs in evidence, the capacity plan and a poloroid picture of the blackboard drawing made by plaintiff and his attorney.

JOSEPH T. STEARNS

Sworn to before me this
2nd day of November, 1973.

Notary Public

GEORGE J. BIERNESSER
Notary Public, State of New York
No. 31-5316775
Qualified in New York County
Commission Expires March 30, 1974

AFFIDAVIT OF JAMES DAVID AUSLANDER IN OPPOSITION SWORN TO NOVEMBER 26, 1973

(SAME TITLE) 70 Civ. 3075 RJW

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK)
: SS:
COUNTY OF NEW YORK)

JAMES DAVID AUSLANDER, being duly sworn, deposes and says:

I am an attorney associated with the firm of ZIMMERMAN & ZIMMERMAN, attorneys for the plaintiff herein.

Plaintiff submits this affidavit in opposition to defendants' motion to set aside the jury's verdict.

It would serve no purpose to recite the facts in detail of this most recently tried case. Suffice it to say that questions of fact arose on each aspect of the case- all of which were resolved against the defendant by the triers of the fact.

Defendant strenuously attempted to prove and convey to the Court and jury that only the defendant and its witnesses were truthful and could make no mistake of facts and that anything testified to the contrary of their "version" or "claim", was either lies, exaggeration, impossibility or a condition [sic] combination of the three.

This then was the precise reason to allow a jury to deliberate and make determination on the facts and claims

as presented. This is the function of the jury and neither counsel nor the Court may interpose their judgment on such facts in controversy upon which the jury has rendered a fair and impartial verdict.

At the outset, defendant set out to prove that the manner of the accident as set forth by the plaintiff did not even in fact happen. The jury was afforded the opportunity of hearing direct and cross examination testimony of the plaintiff and defendants "eye-witness", the chief mate. Whether plaintiff fell or "lay" down and "knealt" on the pallet made for a pure contested question of fact which was resolved in plaintiff's favor.

Defendant next attempted to prove and now argues again that even if plaintiff did fall it was impossible to injure his right shoulder. On this pure contested question of fact as to the manner of his fall, the jury heard witnesses, looked at photos and again resolved this pure contested fact in plaintiff's favor.

Cases cited by defendant demonstrate that probabilities need not be excluded merely that if the manner was possible than that be sufficient to sustain a verdict.

Certainly the dynamics of the accident are possible. There is no stop action camera or instant replay to set forth frame by frame the happening of the accident. What is possible, plausible and probable is as the plaintiff testified,

i.e., when he slipped, he stumbled forward, tripped against a pallet, lost his balance in a twisting motion to his right and then fell striking his right shoulder against a flange jutting out 4-5 inches from the coaming. A human body at fall is a dynamic object- it is not inert as a bag of wheat. To argue as defendant did at trial and now again, that it is impossible for plaintiff to injure his shoulder as described is to cast logic and reason to the wind and to actually ignore how a body does indeed fall every which way as has amply been demonstrated by the above mentioned stop action and instant replay football movies.

But more to the point. In the posture of the contested questions of fact, where defendant had ample opportunity to put before the jury its witnesses, its photos, its theories and argue to the jury its claim of plaintiff's venality, for defendant to now come forward and say, "give me a new trial because the jury didn't believe me, didn't believe my mate, didn't believe my explanations but rather believed the plaintiff and believed his explanations", is to undermine our whole jury system.

Just because defendant is offended at the jury putting its trust in plaintiff and plaintiff's explanation, does not demonstrate that plaintiff's evidence was "false" or that such verdict was "clearly against the weight of the credible evidence", for these are the only grounds afforded to a party on its motion for a new trial.

The burden is upon the moving party to convincingly demonstrate without cavil that the evidence was false or that the verdict was against the weight of the credible evidence.

Consequently nothing defendant states in its affidavit wherein the facts are discussed changes the crux of the matter, to wit: The jury, after listening to facts and arguments reconciling inconsistencies, either disregarded defendant's claims, or accepted plaintiff's explanations for any apparent inconsistency.

This is their function- this is their time honored task- to accept, reject or reconcile. This is what they did in its purest of forms and defendant cannot now be heard to say that their verdict "... was the product of passion, misunderstanding, prejudice..." and to further tarnish this court with inferences of ineptness at the least and charges of skullduggery between the Court and plaintiff at the worst, when defendant, in its affidavit on page 6 therein states,

> "It appears that this jury could not accept the sinister implications of the plaintiff persisting in a fabrication; particularly since the Court took such obvious care to give no intimation to the jury of any opinion on plaintiff's factual claim." (emphasis supplied)

The mere fact two sides contest a factual matter is not sufficient to claim the evidence is false or the verdict improper. If that be the case then every losing party in

a litigation based on factual issues could seek the relief sought by defendant. To sum up this factual point- this is the function of the jury system- to decide who is right- who is wrong- decide who is mistaken- and reconcile, if need be, any inconsistencies or differences and render a verdict.

Defendant next seeks a reversal due to an allegedly improper charge concerning the longshore regulations as expressed in Provenza and the cases following that decision.

Plaintiff submits that until such time as the United States Supreme Court rules Provenza is incorrect, that decision is controlling. Furthermore, since the Albanese case was reversed by the Supreme Court (382 U.S. 268) which reinstated the District Court charge; i.e., the regulations are proper in the jury's evaluation of defendant's conduct, then Provenza is still the controlling law in this circuit.

Insofar as defendant's last ground for reversal, i.e., the admission into evidence of Dr. Maglioto's report, plaintiff submits that not only was the ruling proper but would be, at any rate, de minimus in its effect.

Concerning the damage or injury aspect of plaintiff's claim, there was sufficient independent testimony by plaintiff and his doctor to allow the jury to find for the plaintiff in the amount presented.

Plaintiff testified to approximately 2-1/2 to 3 months disability with concurrent loss of wages. He testified to intermittent periods of lost time thereafter with concurrent loss of wages. He testified to pain, limitation of motion and disability following the accident and to the time of trial. There was testimony as to the reasonable cost of medical services rendered to him.

There was testimony by plaintiff's doctor that he found a 17-1/2% of permanent partial disability to plaintiff's extremity. On this testimony alone, the jury certainly stayed within its province and without any abuse of its power in awarding a verdict of $10,000. to the plaintiff.

Certainly this amount cannot be deemed excessive or shocking to the conscience of the Court or community at large.

Accordingly, it ill behooves the defendant to argue that but for the introduction of Dr. Maglioto's report, this jury could not or should not have arrived at such a result.

Counsel may not search the jury's collective mind and state that this factor was one "...upon which they must have given great weight ..." and one which "...may have resulted in the (jurys) adverse finding of liability." (p. 23 of Defendant's memo).

In substance, the testimony of plaintiff, was to the effect that shortly following his injury and abbreviated

treatment by the company doctor, Dr. Tagliagambe (hereinafter referred to as Dr. Tag), he was told by Dr. Tag there was nothing wrong with him and he should go back to work.

It is submitted that plaintiff proved that Dr. Tag was indeed the company doctor to whom plaintiff was sent by the timekeeper with a "slip" imprinted with the doctor's name which was kept by the timekeeper and given to plaintiff to authorize treatment for him by Dr. Tag. Certainly the jury could logically infer that Dr. Tag was the company doctor- despite the doctor's protestations to the contrary.

Plaintiff testified that he was still "hurting, etc." and accordingly consulted his attorney who thereupon sent him to the Department of Labor.

It should be noted at this time that 33 U.S.C. Sec. 907(b) states in part:

> "Whenever in the opinion of the deputy commissioner a physician has not impartially estimated the degree of permanent disability or the extent of temporary disability of any injured employee, the deputy commissioner shall have the power to cause such employee to be examined by a physician selected by the deputy commissioner and to obtain from such physician a report containing his estimate of such disabilities."

Clearly that is exactly what happened here. Plaintiff complained he was still injured, still disabled and unable to return to work- contrary to Dr. Tag's initial opinion. He was sent to be examined by the independent

consultant (Dr. Maglioto) who then rendered a report to the commissioner that not only were there objective findings of the injury but that plaintiff was in need of additional treatment and still disabled.

Accordingly, plaintiff went back to Dr. Tag for more treatment which in fact he received -and which he received, as Dr. Tag admitted, pursuant to the report, findings and recommendation of the consultant, Dr. Maglioto.

Defendant erroneously makes reference to this medical report as falling under the proscription of 33 U.S.C. Sec. 930(b) and (c).

A reading of this section clearly makes reference to reports filed with the commissioner by the employer and not medical reports filed by treating or examining doctors.

There is nothing in the regulations that proscribes the admissibility of medical reports sought by the Commission pursuant to its own authority to seek same.

McCormick on Evidence, Sec. 59, states that an item of evidence may be logically relevant in several aspects, as leading to distinct inferences or as bearing upon different issues. For one of the purposes it may be competent, but for another incompetent. In this frequently arising situation, "... the normal practice is to admit the evidence. The interest of the adversary is to be protected, not by an objection to its admission, but by a request at the time of the offer for an instruction that the jury is to consider the

evidence only for its allowable purpose."

In the case at bar, counsel for defendant made no specific requests to charge; i.e., the exhibit - made no request to limit the exhibit for one purpose and not another- and other than an initial objection and arguments that the exhibit be kept out in toto- made no request nor exception to the Courts' charge regarding this exhibit.

Certainly the use of the exhibit was to attack the credibility of the "company doctor" concerning his opinion- his treatment- his finding of "nothing wrong" and his direction to plaintiff to "return to work".

When Dr. Tag admitted that he "relied" upon the consultant's report in following a course of further treatment and that he came to a different conclusion than the consultant but that later he followed the consultant's recommendations and that he relied on the report in furthering his treatment of the patient- then this document could be admitted for the purpose of showing inconsistencies between his statement that there was nothing wrong with the man and that he needed no further treatment and his subsequent course of conduct in giving additional treatments and reports.

Furthermore, any time an expert comes to court to testify, it is proper to inquire on cross examination as to what he bases his opinion- as to what reports or documents or facts he relied on to reach that conclusion. To say that Dr. Tag was not brought to court as an expert witness is to

belie the questions put to him by defendant's counsel, i.e., Dr. in your opinion was this man, etc., etc., etc.

It is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness and the jury should be informed as to the facts upon which the expert bases his opinion or conclusions or his actions so that the jury may be in a position to determine if the expert's actions or statements are well founded.

Weibert v. Hanan
202 N.Y. 328.

R. 4515 of the N.Y.C.P.L.R. also states that upon cross examination, the expert may be required to specify the data and other criteria supporting his opinion.

In the case at bar, it was demonstrated and reasonable inference could be raised that there was conflicting facts in existence before the doctor when he embarked upon treatment of the plaintiff as well as his conclusions that "there was nothing wrong with him and he should return to work".

The weight of his testimony then became a question for the jury; his credibility becomes an issue for the jury; and last but certainly not least, the basis upon which he acts is a factor the jury is entitled to know to determine the validity of his testimony.

If this is part of his regular file (which indeed he testified to as part of his file on the patient and which

was marked for identification) then under the liberalized Federal Rules of Civil Procedure, 28 U.S.C., the Courts have held that these rules are to be interpreted liberally in favor of the admissibility of evidence if there is any theory justifying its admission, and the trial judge is given broad discretion in making that determination.

In Ettelson v. Met. Life Ins. Co. 164 F.2d 660, a physician was called as a witness and the Court allowed into evidence the doctor's office records which were verified and adopted by the physician. Here too, Dr. Tag testified to defendant's Exhibit A for identification as being his papers, file and records covering the plaintiff's treatment. He identified the report in his file by Dr. Maglioto as being one from the Department of Labor (of which on its face stated as much).

Upon cross examination, he admitted that he relied (emphasis supplied) on the report for a further course of treatment of the plaintiff, that he relied and made use of the report in arriving at his subsequent course of treatment and diagnosis of the plaintiff. So here too, he verified and adopted "a portion" of his file permitting admission into evidence at least for that purpose.

In the case of White v. Zutell, 263 F.2d 613 (2nd cir.), a report by a doctor not present at trial was admitted into evidence despite there being "no opportunity to cross examine". The Court of Appeals affirmed and stated

that the ruling (admission into evidence) "was clearly correct." They said that "(t)he making of the report was clearly a part of the specialties 'business', indeed that is what he was commissioned to do."

So too, Dr. Maglioto- a medical specialist called into consultation by the Department of Labor to examine and render a report- and he did clearly what he was commissioned to do.

The Court also states what plaintiff argued supra i.e.- the report may be weighed along with all other evidence and its weight be tested by the jury, but it should not be precluded into evidence, 28 U.S.C. Sec. 1732(a).

Again, since there was no specific request by defendant re the treatment of this exhibit nor any specific exception by defendant re the weight to be given to the exhibit, the Courts general charge to the jury re the weight of all evidence and credibility of witnesses and effect of exhibits must stand and cannot now be challenged.

Furthermore, it must be pointed out that merely because a party has no opportunity to cross examine the writer of a medical exhibit, does not in and of itself, compel exclusion.

Medina v. Erickson
226 F.2nd 475, cert.
denied, 351 U.S. 912.

WHEREFORE, on all facets defendant's motion should be denied in all respects.

Sworn to before me this

26th day of November, 1973. signed James David Auslander
James David Auslander

MYRA GREENE
NOTARY PUBLIC, State of New York
No. 31-6652858
Qualified in New York County
Commission Expires March 30, 19__

AFFIDAVIT OF ALBERT V. TESTA IN OPPOSITION SWORN TO NOVEMBER ___, 1973

(SAME TITLE)

AFFIDAVIT IN

OPPOSITION

70 Civ. 3075

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

ALBERT V. TESTA, being duly sworn, deposes and says:

I am an attorney associated with ALEXANDER, ASH, SCHWARTZ & COHEN, attorneys for the third-party defendant in this case, and make this Affidavit in Opposition to the defendant and third-party plaintiff's motion for judgement notwithstanding the verdict in the third-party defendant's favor in the case of the third-party plaintiff against the third-party defendant for indemnity.

This action for damages for personal injuries allegedly sustained by the plaintiff on October 28, 1969 was tried before MR. JUSTICE WARD and a jury from October 16 to October 24, 1973 and resulted in a jury verdict in favor of the plaintiff in the sum of $10,000. In connection with this verdict, certain Special Interrogatories were submitted to the jury and the jury found that the vessel was not unseaworthy, but the defendant was negligent. The jury also found that the defendant had not established its claim that the plaintiff was contributorily negligent and the jury

found that the defendant had not established its claim that the third-party defendant had breached its warranty of workmanlike performance.

The facts with respect to the defendant's motion for judgement notwithstanding the verdict in plaintiff's favor against the defendant are amply set forth in Mr. Stearns affidavit in support of this motion. Deponent will therefore address himself to that part of this motion whereby the defendant and third party plaintiff is seeking judgement notwithstanding the verdict in the third party defendant's favor in the third party action for indemnity.

At the outset, deponent would like to direct the Court's attention to the fact that the jury's verdict in this case, adverse to the shipowner, does not necessarily imply a jury finding of any breach of the co-called housekeeping section of the Longshoring Regulations. The testimony in this case indicated that there was a pallet walkway running from the hatch coaming to the ship's railing on the starboard side of the #4 hatch and both Captain Stahl and Captain Wheeler testified that there was nothing unusual about such a walkway, that it was customary for stevedores to use such walkways and that the use of such a walkway would not constitute an unworkmanlike performance by the stevedore. Although the initial reports in this case made no mention of oil and grease, plaintiff testified that he slipped on some grease

spots which he did not see until it was too late to avoid them because his attention had been diverted upward due to a cracking sound made by one of the booms.

Captain Stahl testified that he had been on duty on the day of the plaintiff's accident, had supervised the crew in opening the hatches and had walked completely around the #4 hatch as well as other hatches and had not seen any oil or grease on the deck in the vicinity where plaintiff claims he fell. Captain Stahl testified that it was his job to look out for safety aboard the vessel and that he had, specific orders from the defendant shipping company, to lookout for safety conditions on the vessel. He further testified that if there was oil and grease on the vessel and he did not do something about it and someone was injured, that he would be held responsible.

Although Captain Stahl testified that he saw the plaintiff look around and then get down on his knees and lay down on the pallets, which he construed to be play-acting on the part of the plaintiff, Mr. Bernadini claimed he fell and also advised Captain Stahl that he was claiming an unsafe passage.

In spite of the fact that Captain Stahl testified that the plaintiff "faked" an accident in this case, it is obvious that the jury rejected Captain Stahl's testimony and believed the plaintiff's claim of an unsafe passageway. Furthermore, there is no way that anyone can determine in

what respects the jury decided that the defendant shipowner was negligent.

This finding of negligence on the part of the defendant not only does not imply a jury finding of a breach of any housekeeping sections of the Longshoring Regulations, but obviously constitutes a finding of negligence on the part of the defendant with respect to the safety of the deck in the vicinity of the #4 hatch where plaintiff's accident happened, which safety Captain Stahl accepted the responsibility for by unequivocally testifying that it was his job to look out for safety conditions on the vessel, which would, of course,include the area where plaintiff's accident happened.

The plaintiff testified that he was hired by the third party defendant on the day of his accident when he shaped up at the union hall. He said that he went aboard the defendant's vessel for the first time at 8:45 A. M. and the accident happened at 8:50 A.M. before he had had an opportunity to do any work for the third party defendant since he was in the process of looking for a ladder to descend into the #4 hatch when the plaintiff's accident happened.

Since the Chief Mate testified that he went on duty at 7:30 A.M. on the day of the plaintiff's accident and had walked around the #4 hatch at 8 A.M., 8:15 A.M., 8:30 A.M.

and 8:45 A.M. and was standing along side the #4 hatch when the plaintiff's accident happened, the jury could well have found that whatever unsafe passageway or unsafe conditions existed were due to the negligence of the Chief Mate in not correcting or removing the same.

The finding that the defendant did not establish its claim that the third party defendant breached its warranty of workmanlike performance of the stevedore operations, clearly exonerates the third party defendant from any finding of a breach of the housekeeping sections of the Longshoring Regulations, which were expressly contained in the Court's charge to the jury. Deponent submits that there was no error in the Court's not charging that a breach of these regulations would entitle the third party plaintiff to indemnity, since the regulations themselves were contained in the Court's charge to the jury and the jury's findings clearly indicate that they did not find any breach of these regulations by the third party defendant stevedore.

It further appeared from Captain Stahl's testimony that the ship's crew oiled the wheels on the hatch covers of the #4 hatch during the voyage, that this was done by the ship's carpenter and that if any oil or grease dripped on to the deck, it was the duty of the ship's carpenter to clean it up. We thus have a situation in which questions of fact with respect to whose duty and obligation it was to

furnish the plaintiff with a safe place in which to work and to correct or remedy any unsafe conditions which may have existed were presented which questions were resolved in favor of the stevedore and against the shipowner and the Court should not substitute its own judgment for that of the jury.

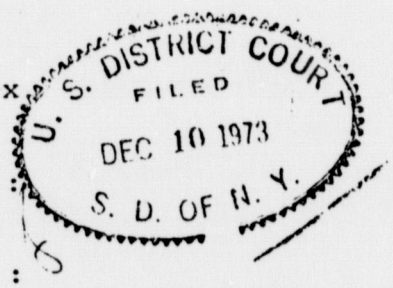
WHEREFORE, deponent respectfully submits that the portion of the defendant and third party plaintiff's motion for judgement notwithstanding the verdict in the third party defendant's favor in the third party action for indemnity should be denied in all respects.

(rubber stamped) ALBERT V. TESTA

Sworn to before me this ___
day of November, 1973.

OPINION AND ORDER OF ROBERT J. WARD DATED DECEMBER 10, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



FRANK BERNARDINI,

Plaintiff,

-against-

REDERI A/B SATURNUS,

Defendant and Third Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant.

70 Civ. 3075
R.J.W.

Defendant and third-party plaintiff Rederi A/B Saturnus ("the shipowner") moves for an order pursuant to Rules 50(b) and 59, Fed. R. Civ. P., for judgment notwithstanding the verdict against it and in favor of plaintiff and third-party defendant respectively and for a new trial. For the reasons which follow, the motion is denied.

Plaintiff, a longshoreman, testified that a few minutes after he boarded defendant's vessel at Pier 21, Brocklyn, New York, on October 28, 1969, he slipped on some

grease on the deck near number 4 hatch, tripped on pallets which had previously been placed on the deck and fell, sustaining an injury to the top of his right shoulder. The shipowner contended that the accident never occurred and produced the Chief Mate of the vessel, Rune Stahl. Mr. Stahl testified that he was standing near where plaintiff's accident is alleged to have occurred and that the plaintiff was "play acting" and had "faked" the accident. He further testified that he was responsible for safety aboard the vessel and that although he had walked around the number 4 hatch on several occasions shortly before the occurrence, he did not observe any grease on the deck.

The question of whether the shipowner had breached its duty to furnish plaintiff with a safe place to work and to maintain the deck in a safe condition as well as the question of whether the third-party defendant had breached its warranty of workmanlike performance were issues of fact for the jury. They were submitted to the jury which resolved them against the shipowner and in favor of the plaintiff and the third-party defendant respectively.

The jury chose to believe the plaintiff, and in a special verdict found the shipowner negligent and its negligence to be a proximate cause of the plaintiff's ac-

cident, found the plaintiff was not negligent and awarded him $10,000 damages. In addition, the jury found that the shipowner did not establish its claim that the third-party defendant had breached its warranty of workmanlike performance.

On a motion under Rule 50(b), the Court is required to view the evidence in the light most favorable to the parties other than the movant, in this case the plaintiff and third-party defendant, and the motion can only be granted if (1) there is a complete absence of probative evidence to support the jury's verdict, or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair-minded men in the exercise of impartial judgment could not arrive at a verdict against the shipowner. Armstrong v. Commerce Tankers Corp., 423 F.2d 957, 959 (2d Cir.), cert. denied, 400 U.S. 833 (1970).

In this case, the plaintiff's testimony, which the jury chose to believe, provides the probative evidence required to support the jury's verdict. Nor can it be said that in this case the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair-minded men in the exercise of impartial judgment could not arrive at the verdict which this jury reached. Under these cir-

cumstances, the Court may not substitute its own judgment for that of the jury. International Terminal Operating Co., Inc. v. N.V. Nederl. Amerik Stoomv. Maats, 393 U.S. 74 (1968); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962); Armstrong v. Commerce Tankers Corp., supra.

The shipowner also moves for a new trial pursuant to Rule 59, Fed. R. Civ. P., arguing not only that the verdict is against the weight of the evidence, which the Court rejects for the reasons set forth above, but also that the Court erred in improperly instructing the jury and in admitting evidence. The shipowner points to that portion of the Court's charge relating to the Safety and Health Regulations for Longshoring. The Court, following Provenza v. American Export Lines, Inc., 324 F.2d 660 (4th Cir. 1963), cert. denied, 376 U.S. 952 (1964), charged that if the jury found that the third-party defendant violated the Regulations, their violation would render the vessel unseaworthy and if such unseaworthiness was the proximate cause of plaintiff's injury it would also render the defendant shipowner liable. The Court charged that if the jury found that the third-party defendant violated the Regulations such conduct by the third party defendant could also be found by the jury to constitute

negligence; and that if in turn this negligent conduct of the stevedore were known, or by the exercise of reasonable care should have been known to the shipowner and such negligence of the stevedore was a proximate cause of plaintiff's injury, then the shipowner too would be liable to plaintiff on the additional ground of negligence. Later, in discussing the shipowner's claim against the third-party defendant, the Court charged that the shipowner contended that if it was found liable to the plaintiff, it would be because the third-party defendant breached its warranty of workmanlike performance, noting "[E]ssentially, the shipowner's claim is that ITO (the third-party defendant) was negligent."

Although the Court believes its charge to have been correct, even assuming this portion of the charge to have been erroneous, the error was harmless inasmuch as the jury found that the plaintiff did not establish his claim that the vessel was in an unseaworthy condition and that the third-party defendant did not breach its warranty of workmanlike performance, i.e., was not negligent.

The erroneous admission of evidence is alleged to have occurred when the Court admitted the report of Doctor Magliato, a physician selected by the U.S. Department of

Labor, relative to an examination which he made of plaintiff in November, 1969. Such examinations are authorized by statute, 33 U.S.C. §907. The admission of the report, whose authenticity was undisputed, was proper despite the fact that Doctor Magliato was not present at trial and there was no opportunity to cross-examine him. See, 28 U.S.C. §1732; White v. Zutell, 263 F.2d 613 (2d Cir. 1959); Medina v. Erickson, 226 F.2d 475 (9th Cir. 1955), cert. den., 351 U.S. 912 (1956).

The Court has considered the remainder of the defendant and third-party plaintiff's contentions and rejects them. Accordingly, the motion is in all respects denied.

It is so ordered.

Dated: December 10, 1973

Robert J. Ward
U. S. D. J.

rkkl

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FRANK BERNARDINI,

Plaintiff,

-against-

REDERI A/B SATURNUS,

Defendant and 3rd party plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

3rd party defendant.

70 Civ. 3075

Before:

HON. ROBERT J. WARD,

District Judge
and a jury

New York, N. Y.
October 16, 1973 - 10 a.m.

APPEARANCES:

ZIMMERMAN & ZIMMERMAN
Attorneys for plaintiff
BY: JAMES DAVID AUSLANDER, Esq.

HAIGHT GARDNER POOR & HAVENS
Attorneys for defendant and 3rd party plaintiff
BY: JOSEPH T. STEARNS, Esq.

APPEARANCES (continued)

ALEXANDER ASH SCHWARTZ & COHEN
Attorneys for 3rd party defendant
BY: ALBERT V. TESTA, Esq.

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THE COURT: We will now begin by hearing the opening statements of counsel.

Mr. Auslander.

MR. AUSLANDER: If it please the Court, Mr. Stearns, Mr. Testa, Madam Foreman, ladies and gentlemen.

Those of you who have sat on juries before or if you have even watched television and you have seen "Perry Mason" and "The Defenders" and so forth --

MR. TESTA: If your Honor please, I would like to hear Mr. Auslander.

THE COURT: If you could keep your voice up a little louder.

MR. AUSLANDER: I will try, your Honor. I have a little bit of a hoarseness.

THE COURT: In that event, Mr. Testa, perhaps you would want to move over somewhat so you could hear Mr. Auslander.

MR. AUSLANDER: This is the opportunity for myself on behalf of my client, Mr. Bernardini, to give you a little

bit of an idea of what this case is all about so that when you listen to the testimony during the trial, you can piece together the evidence or whatever exhibits there might be and get a complete picture of what goes on because evidence doesn't always come in in a straight numerical order.

This is, as the Judge told you, a civil case. It is a personal jury case. There was an accident that happened to Mr. Bernardini on October 28, 1969. Mr. Bernardini was a longshoreman, is a longshoreman. A longshoreman is one of those group of men who work on ships to move cargo, either onto the ship or off the ship and usually they work in what is called a regular gang. Some 18 or 20 men, they go with the group to the pier and are assigned by the stevedore which is really the boss, the company, to various hatches or holds which are these big storage compartments on the ship and they work there, either taking cargo out, putting cargo in.

Sometime, as is the case with Mr. Bernardini on October 28, 1969, his regular gang did not have an assignment and in that situation, the individual longshoreman will go down to what is called the hiring hall and they will shape up, put in their cards or badges looking for work and if there is work, they will assign five men to go here, ten men to go there, or whatever in that category and that is what

he did that morning.

His regular gang did not have an assignment that day. He went to the hiring hall and they hired him to work as a hold man in a strange gang, different gang, one that he was not working with and they said the ship he is to be working is in Brooklyn and he is to go there and he did.

He came down to the pier and he checks in at the timekeeper's office which is the place where they identify themselves and give in their badge and show their card that they are supposed to be working and the timekeeper, if he has an opening two men short in this gang and one man short in that gang, he will say go over to hatch number four, Jack's gang, Billy's gang, whatever and report to the hatch boss which is like the foreman, the guy in charge and you go down and work in the hold or whatever his assignment is.

He may have been a dock man, a deck man. In this situation he was a hold man. That was his normal job working down in the ship.

After he reported to the timekeeper's office and they told him to go to hatch number four, he goes to this ship that he had never been on before and he walks up the gangway which is this little ladder or stairway leading from the pier to the ship and he gets on it and he walks over to what he believes is hatch number four.

The hatch, if you can imagine it, might be shapred something similar to this table and it goes from the top deck all the way down and around the hatch is sort of like a wall. This is called the coaming, so from the deck which is the floor you are standing on, the open deck, you have this wall that comes up in various heights on different ships.

The reason for this basically is when the ship is at sea and it is a very bad day and thewaves come on the ship, this wall sort of acts as a preventer so the water won't slush down into the hatch and make the cargo wet or damage it and when they are at sea they have covers over the hatch and tarpaulins and so forth but when they are working cargo, this whole area is open and the cargo can either come down or go out of this hatch.

They have this coaming that can sometimes come up about this high.

He comes onto the ship and if you can imagine this is the hatch although it is not quite as long as this is in scale, and he doesn't know where the ladder is to go from the top down to the bottom, on some of these ships you might have a ladder attached at the end of the hatch from the inside going straight down and the longshoreman will climb over it and start going down theladder to go down to the deck below.

Sometimes they have what is called an escape ladder which is an enclosed ladder in a different part of the deck that you open a door and you climb down theladder and it takes you down to the decks below.

At any rate, he came over onto the ship, made a turn, came over and looked, didn't see the coaming but he sees another longshoreman standing on this side of the hatch in the deck area between the hatch and the rail.

Maybe I can show you a little better just for purposes of my presentation but as the Judge pointed out to you, this is not evidence and what is or what counsel may say after is not evidence, it is just an aid for me to help you understand what our case is going to be about.

Imagine if you will if you are looking down from a helicopter or seagull flying above the ship, this would be the open hatch. This is the rail that you would lean over if you were taking a cruise. This is deck space. This is deck space on the other side of the hatch. This is also deck space all around here.

When a ship is tied up to the pier, to the dock, the side nearest the pier is called the inshore side and you will hear this expression during the course of the testimony.

The other side, the water side is called the offshore side. Inshore, offshore.

When he came onto the ship, the gangway was somewhere around here. He came onto the ship, came over and looked for the ladder. The ladder sometimes is attached here, sometimes in the corner, sometimes here, going down. At any rate, he couldn't see the ladder but he sees a man standing here, a longshoreman, rigging a boom. That means adjusting the boom.

The boom if you recall are these long poles or like little cranes that are on ships that lines hang from and that moves the cargo. They raise it up, swing it over to the dock and lower it again.

Anyway, this man is pulling on a wire to get the boom straightened out.

Mr. Bernardini walks over and says to him in substance, where is the ladder, this is number four hatch, number four gang, and the longshoreman says over there, meaning this general direction over here.

Mr. Bernardini walks over, still doesn't see the ladder and now when he comes around here to the inshore side, he notices that there is another longshoreman standing here. He decides to walk over and ask him where the ladder is so he could get down and start going to work.

This is not as is drawn to scale, but approximately some ten feet, as he would tellyou from the corner where he made his turn, there were some pallets. Pallets are wooden

platforms, maybe six by eight feet and these little platforms are used for cargo to be put on and the platform may contain ten or fifteen boxes, whatever it may be, would be tied to the lines and be lifted into the hatch and the empty pallets would come back out or vice versa.

In other words, it is used to move the cargo in, it doesn't come in one piece at a time.

They had lined up across the deck some pallets from the coaming stretched to the rail; one or two high and eachpallet is maybe about eight inches off the ground from the bottom to where the platform is.

The purpose they were being used for that date, you would surmise, was for a deck man, one of the men who work here to walk back and forth over so he can, when the cargo is being lifted from the hatch, he can look over this coaming and see when it is ready, then give a signal to a man working these winches which control the booms.

When he sees everything is okay, he will give the signal, the men will use the machinery and the empty pallet will come out andswing over to the dock.

The signalman or the deck man will then walk over to the rail and when he sees the pallet coming down at the right level, he will give another signal to the winch man who frequently cannot see what is going on on the dock

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because he is at a different level and he will know when to start the machinery, raise it, lower it, whatever.

This was like a little platform that was to be used by the deck man or signalman walking back and forth from this coaming to look down, everything okay, all right, raise it up.

It was raised up and brought over to the dock. He walks across from the rail, yells hard, and they load it or unload, whatever they have to do and he yells again, okay, bring it up and he walks across this platform, looks down into the hatch, sees the cargo come down and says all right, cut it off, and that is the job.

When Mr. Bernardini came around this corner, these pallets were obstructing the deck. When he made the turn, instead of walking, he heard some crackling or whipping sound from the boom and looked up to see if everything was okay because naturally that is a dangerous situaation if a boom is going to drop or something and if you will picture in your mind walking around the coaming around this corner as he makes this turn, bang bang he hears this crackling, he looks up, everything is okay and then right on top of him, so to speak, before he has a chance to do anything, he sees some grease spots or oil spots on the deck and he tries to get around it but he is not able to and he slips, falls, trips

over the pallet, hits the coaming and leans over and falls onto the deck and that is how the accident happened.

He then got up. His jacket was ripped, his shoulder was bleeding inside. He had some scrapes. He left the ship and he went back to the timekeeper and made out a report.

The timekeeper sent him to the doctor and he started getting treatment from the doctor.

We are claiming in this case two theories of why we believe the ship owner was liable.

One theory, we claim there was negligence and two, the ship was unseaworthy.

These are two expressions that his Honor will tell you in detail what they mean but I think I am permitted just briefly to advise you that when we say that the ship was not seaworthy, we do not mean that it would sink if it goes to sea, that there are holes in the bottom or something like that.

Seaworthy means that it was not a fit place to work, to walk, but there was an obligation owing to my client as a member of the stevedore gang aboard that ship to have a safe place to walk, not to have a deck obstructed by pallets, not to have oil or grease onthe deck causing a dangerous or hazardous condition of somebody that comes

onto it.

As I said, following the accident Mr. Bernardini went off the ship, went to the doctor, sent to the company doctor and he started to get treatment. The doctor after a period of time said go back to work now.

His shoulder was still bothering him so he contacted an attorney who sent him to the Department of Labor who covers situations like this where he got another examination by a doctor there who advised him to go back for further treatment to the company doctor.

The company doctor took him back and gave him more treatment so he was out of work approximately six weeks.

Following his return to work in the winter, this is now December, the cold weather, the wet weather and the heavy work, his shoulder still bothered him and he was caused to lose some additional days which he will tell you about, because if he were working hard in the cold damp weather, when he woke up the next morning, his shoulder stiffened up on him and he could not go in.

He lost more time and was not paid his salary while he was out and to this day, his shoulder still bothers him and we will have, we will present to you his testimony and medical testimony from a doctor we sent him to for examination

who will come into court and tell you what he found and what he believes is wrong with the man's shoulder.

This is the plaintiff's story, this is his claim. Obviously we wouldn't be here trying the case unless the defendant said, I don't believe it.

If the ship owner felt that we were one hundred percent right we wouldn't be here. They have told us and we will tell you that they have an eye witness that the accident didn't happen. I want you to listen carefully to whomever they bring in, what his motives might be, whether he is protecting anybody, whether he is worried about anything.

It is a pure question of fact in this case and it is for you to determine afterlistening to Mr. Bernardini, after observing him, the type of man he is, a family man, never been involved with the police, never been convicted of a crime, whether he would fabricate a story like this, make up a claim like that, but I will talk to you more about that at the end of the case.

Suffice it to say at this time, I ask youto keep an open mind, listen to the testimony, watch the witnesses and hopefully at the end, you will find in favor of my client.

Thank you very much.

THE COURT: Mr. Stearns.

MR. STEARNS: Your Honor, Mr. Testa, Mr. Auslander, ladies and gentlemen.

We are not here this morning discussing a case that has not been discussed before and that has not been the subject of so-called discovery. We hav e had the opportunity to take the deposition of Mr. Bernardini. That istaken down in some 61 pages in this book. It was testimony given by Mr. Bernardini in our offices in response to questions asked by me and it was given under oath.

As Mr. Auslander indicates, we do have an eye witness, not a man who claims to be an eye witness but an eye witness to this accident and his testimony will be heard live by you in Court today.

To get back to what Mr. Auslander has said, he has indicated to you in his opening that Mr. Bernardini came on the Svensksund early in the morning on October 28, 1969, came up the gangway and got onto the so-called main deck of the ship.

That is just the top area of the ship.

He then according to Mr. Auslander and according to his deposition testimony and I think there will be some discrepancies, proceeded in an aft direction.

In other words, he went to the aft end of the ship, the stern which is back here because he said he had been

assigned to the number four hatch. The number four hatch is one of the hatches after the so-called midshiphouse.

The midshiphouse would appear here in this diagram and that is the superstructure of the ship, where the ship's officers and the ship's crew live.

Many of you have seen cargo ships and I believe you are familiar iwth that.

Again, this is a view looking straight down.

He said he got off the gangway and walked over to the number four hatch. At that point according to what he testified at his deposition, he saw a man standing there on the inshore side. He claims to have had a brief conversation with this man and then to have walked to the offshore side by walking across the ship in this direction as the line indicates.

He then says that he saw another longshoreman working, rigging the booms. The booms are the long spars or poles that are used in the handling of cargo. That is really a little bit irrelevant to what we are discussing here.

That is whatthis man according to the plaintiff was doing.

He then proceeded aft, according to his deposition, in this direction looking for a hatch ladder. He was looking for the ladder to get down into the hold of the ship.

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The cargo ship has a large cargo compartment comprised of two decks. He had to go down to work in the hold. This man has worked as a longshoreman and a s a hold man, one of the men that goes down into the hold of the ship for 25 years.

He testified he was looking for the ladder into the hold. As Mr. Auslander indicated, there are generally two kinds. There are ladders that are attached to the inside of the coaming which is represented by the square and then there are escape hatch ladders. This ship happened to have had an escape hatch ladder. We will show you where this escape hatch ladder was. It was at the beginning of this man's journey.

There was no reason for him to walk across the ship to talk to the longshore man, there was no reason for him to walk aft, there was no reason for him to walk behind and there was no reason for him to walk forward because the escape hatch ladder leading into the hold was here on the forward end of the hatch.

It was there and it was obvious to him and he says that he asked somebody where the ladder was and he began this journey around the complete area of the hatch, keeping the hatch coaming to his left as he went all the way around looking for this ladder.

That is a little bit contradictory because the line has been drawn to here and it would indicate that Mr. Bernardini at least is wasting a considerable amount of time in making this journey when he is going back.

Apparently, as he testifies, he missed this ladder but his claim is that he was looking for it.

Also at his deposition, he testified as he was walking forward with the coaming on his lefthand side and the ship's rail on his right, he is walking forward and as he began walking forward, he saw grease spots on the deck of the ship.

He testified at his deposition that he then began to dodge these grease spots and he said he was using tippy-toe steps to do so but somehow he mis-stepped, he stepped with his left foot, he testified to this, and fell forward onto the pallets.

There is no testimony from Mr. Bernardini in 61 pages of his transcript about any slip and trip. Slip and trip as Mr. Auslander so ardently described it.

Again as I understand it, as I read the man's testimony, he said he slipped and he fell forward and he laid down.

He claimed walking forward with the coaming on his lefthand side that somehow he struck his right shoulder against

the coaming on his left. We will have to listen very carefully to his testimony on that point to understand how that is physically possible.

Mr. Auslander says there was a man here and that this man was a longshoreman. Mr. Bernardini testified that the man was the ship's mate. He also testified he was ten or 15 feet away from him. He also testified that he was watching me, the mate was watching Mr. Bernardini and Mr. Bernardini volunteered that the mate will say that I did not fall and the mate will say exactly that.

The man was not with his regular gang, he claims not to have been on the ship before, he is making this grand tour of the number four hatch looking for a hatch ladder that he should have seen immediately with respect to the 25 years he has been doing this type of work.

He walks forward with the coaming on his left. He somehow slips stricking his left shoulder.

Listen carefully to all the petty, small, tiny details of Mr. Bernardini's testimony.

As Mr. Auslander conceded, Mr. Bernardini that he had an accident and the mate will testify that Mr. Bernardini laid down on the pallets and complained of having an accident.

This is a distasteful kind of confrontation for me.

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It is distasteful as far as the case has produced thus far.

THE COURT: The comments are unnecessary and I would ask the jury to disregard them and I would trust from this point on, no counsel makes any reference to his own personal views.

MR. STEARNS: In this kind of conflict, one man says one thing, another man says another. It is extremely important to pay attention to the details because the verification of who is telling the truth, will come from the details, the small facts, the physical arrangement of the ship, the small facts about why, for example, Mr. Bernardini was walking all the way around the ship for something that was right in front of him when he first got on the ship, the small fact as to can a man slip then trip, the small fact that if a man trips, falls forward and he testified at his deposition he fell forward, how he could strike his right shoulder against something to his left. The man also testified he had grease on his jacket. There is no testimony that there will be any grease on the pallets --

MR. AUSLANDER: Your Honor, this would more properly be said in summation rather than opening statement.

THE COURT: I permitted you some leeway and I will do the same to your colleague.

MR. STEARNS: The first question here is what about

this claimed accident? The second question and the only means to approach this as is and to go no further with this because it is better if it comes from the witnesses is to pay attention to the small details of this and consider very carefully the testimony you will hear.

Thank you.

MR. TESTA: Your Honor, Mr. Auslander, Mr. Stearns and ladies and gentlemen of the jury.

You have heard two versions of how an accident allegedly happened here and after having heard Mr. Auslander and after having heard Mr. Stearns, you may very well be wondering why I am here and why my client, International Terminal Operating Company is in this case at all.

My client has been wondering that same thing ever since the case started, but everybody has a right to bring a lawsuit and Mr. Bernardini had a right to bring a lawsuit -- not a right, but everybody can sue somebody if they feel an accident has happened and he brought a lawsuit and the ship owner in this case has brought my client in as a third party defendant and while Judge Ward used these terms, I want to be sure that you absolutely understand what this means.

Actually there are two lawsuits here.

Mr. Bernardini is solely and only suing the ship owner in this case. It is a name that is a little difficult

to pronounce so I will not try to pronounce it, but he is only suing the ship owner in this case, he is not suing my client, International Terminal Operating Company.

He is not looking to my client for money. He is not making any claim by my client. He was working for my client at the time this accident happened. He was working as a longshoreman for -- I want to refer to my client as ITO. It is easier to say.

He was employed by ITO as a longshoreman. ITO is a contract stevedore and we agreed to load or unload this situation whatever the situation is but it is not important. According to what Mr. Bernardini said, he never got to this point, but that is all we agreed to do whatever the situation may have been in this particular case.

I want you to bear in mind that there are two separate and distinct lawsuits here and you are going to have to distinguish between them.

In case number one, Mr. Bernardini is suing the ship owners on the theory of negligence and ship unworthiness. He is saying your ship was negligent and your ship was unseaworthy, for the reason Mr. Auslander gave you, allegedly there was some oil and grease on the deck when he slipped on, and Mr. Stearns is denying this, he says our ship is not seaworthy and was not negligent and he said he will bring a

witness to tell you this accident never happened, that this man didn't slip, he didn't fall, he didn't trip. He just came along and looked around to see if anybody was watching then laid down on top of these pallets and started complaining about having had an accident.

So, he is hear defending the claim by Mr. Bernardini against the ship owner saying there was no negligence, there was no unseaworthiness, in fact there was no accident of any kind and that is case number one.

Case number two is a situation wherein the ship owner has brought my client into the case on an entirely different legal principle, and he is saying while he is defending this first action, he is saying there is no negligence, no unseaworthiness, no accident ever happened, therefore you Mr. Bernardini are not entitled to any money and he is also saying if by any chance you gentlemen and ladies of the jury should believe Mr. Bernardini's story that some kind of an accident did happen, that he is entitled, that is, if you, members of the jury decide that Mr. Bernardini is entitled to some money from the ship owner, that the ship owner is entitled to get that money back from my client the stevedore and is to you right now the ship owner, if you should decide that an accident did happen here and if you should decide that Mr. Bernardini is entitled to anything from the ship

owner, the ship owner is not entitled to get that money back from from my client and there is a very good reason for it because it is our contention and our position in this case that we performed our contract, we had a contract to either load or unload this ship, whatever the evidence shows here and we did it.

We did it ina workmanlike manner and we are not responsible, if you believe Mr. Bernardini's version of how the accident happened, we are not responsible for any condition which may have caused this accident.

It is our position that we did not do or fail to do anything which in any manner, shape or form, contributed to the happening of this accident. We are not responsible for this ship or the condition of its decks or anything about it. We were there for the sole and only purpose to either put cargo in the ship or take it out.

MR. STEARNS: Can I object to Mr. Testa telling the jury what the stevedores' obligations were, the circumstances about which there is a great deal said in the law.

THE COURT: It does go over but I suppose he is right. Each of you has made some reference to legal principles. Let me suggest that the matter of legal principles, while it is adverted to by counsel, is a matter which is within the Court's province and I will at the conclusion of the

case instruct you as to the law.

I think it is always difficult for counsel when they are making their statements, whether opening statements or closing statements to completely ignore the law and therefore I don't cut them off unless they dwell extensively on the matter.

Certainly so far Mr. Testa has not dwelled extensively on matters of law and I am sure he will not.

MR. TESTA: It is my intention merely to state the stevedores' position in this case and the stevedores' contention and to make clear to the jury why we feel, I feel and my client feels we should not be in this case because we feel there is no responsibility on the part of the stevedore.

Now, you have two separate and distinct lawsuits here, number one. More than that, you have a very sharp question of credibility in this case and you ladies and gentlemen are going to have to decide this case solely and only on the basis of credibility. There may be a document or two in the case but it will boil down to whose word do you want to believe.

Do you want to believe Mr. Bernardini's version of the story or the ship's officer who Mr. Stearns tells you will come in and say no accident ever happened at all.

This is a question of credibility. We weren't

there, you weren't there, so you are going to have to decide this just by listening to these two versions of this story.

You will have to listen to Mr. Bernardini first then the ship's officer.

How do you do this? You watch the man as he testifies. He is going to be under oath and you listen to the manner which he says something happened and you judge him and you evaluate his testimony as against the background of all the facts, all the other facts that you will hear in this case, then you will have to decide whether you want to believe Mr. Bernardini that an accident ahppened the way he said it happened, or whether you want to believe the ship's officer that no accident ever happened at all of any kind.

Obviously if you believe the ship's officer that no accident happened at all, if the man just went in there and laid down on the pallet and made up this whole thing out of whole cloth, obviously he is not entitled to anything and you should come in andbring in a verdict for the defendant and not give him anything.

We are not here to decide whether to believe cases, we are here to decide whether there was an actual accident or something.

Even if you believe Mr. Bernardini's story, it is

our position that we are not involved in this case. This is a fight between Mr. Bernardini and the ship owner.

There was testimony by Mr. Bernardini as Mr. Stearns pointed out to you and in his own testimony he said when he reported this accident, he didn't tell anybody that he slipped on oil or grease. He says this right in his examination before trial.

This is an accident report in this case that doesn't make any mention of oil and grease.

Just bear this in mind. These are all little things, but bear in mind when an accident happens and you report something, you usually tell exactly what happened and when you add up allthese little things, it will be for you to decide whether there was any oil and grease, whether in fact an accident of any kind happened or not, so I want you to just listen carefully to Mr. Bernardini, to the ship's officer and any other witnesses that you hear in this case.

At the end of the case I will get a chance tocome back and talk to you again.

There is only one other thing I want to point out to you. At this time we spoke to you in a certain order. Mr. Auslander spoke to you first, Mr. Stearns second and I spoke to you third and that is because the plaintiff, Mr. Bernardini has the burden of proof. He has the burden of

proving the claim he is making as against the ship owner and the ship owner has the same burden of proving their claim and see whether or not Mr. Bernardini sustained his burden of proof or whether the ship owner has and evaluate the testimony.

At the end of the case we will come back to talk to you again.

Thank you very much.

THE COURT: Thank you, Mr. Testa.

Ladies and gentlemen, you have now heard the opening statements of all three counsel. The next stage in the trial is the matter of the taking of testimony and the introduction of exhibits.

I note it is now ten minutes of one. It was my intention to take our luncheon recess at 1:00 p.m. However, I could not fail to note during the opening statements of counsel there was some fairly audible music which was coming from outside of the courtroom and I commend the jurors for the close attention they paid to counsel.

The music as I understand it relates to the opening of the adjoining police headquarters and I have been listening as you have, at least partial hearing, to the music.

My suggestion, since the music appears to be getting louder is that we advance our luncheon recess from 1:00

until ten minutes of one. Also I might add, this neighborhood may be somewhat more crowded during the luncheon hour because of the people coming for the dedication of the adjoining police headquarters.

In view of that fact, I will recess the trial now at about nine minutes to one and ask youto have your lunch and to return here at 2:00 when we will begin the taking of testimony.

May I suggest as you go to lunch that you not discuss the case with anyone or remain within the hearing of anyone discussing the case. You are to discuss the case only after it has been submitted to you and you deliberate upon it in the jury room. Please keep an open mind and return here promptly so we may begin the taking of testimony at 2:00.

(Luncheon recess.)

AFTERNOON SESSION

2:00 p.m.

(In open court - jury present.)

THE COURT: Good afternoon ladies and gentlemen. You may proceed.

MR. AUSLANDER: Mr. Bernardini.

F R A N K B E R N A R D I N I, having been first duly sworn, was examined and testified as follows:

THE COURT: You may proceed, Mr. Auslander.

DIRECT EXAMINATION

BY MR. AUSLANDER:

Q Mr. Bernardini, how old are you, sir?

A 43.

Q Are you married?

A Married and two children.

Q How old are they?

MR. TESTA: It is objectionable, if your Honor please. I don't see any relevancy with respect to this line of questioning, concerning children.

THE COURT: Overruled. The question has been asked and answered.

Q You live with your wife and support your wife and children?

A Yes.

Q Mr. Bernardini, have you ever been convicted of a crime?

A No.

MR. TESTA: If your Honor please, I can't hear the witness.

THE COURT: Would you please from this point on keep your voice up. If you are speaking in sentences, don't drop your voice at the end of the sentence. Not only do you want your own counsel to hear, but we want all the members of the jury to hear and the other attorneys as well.

Q Do you have a speech problem?

A Yes.

Q What is that problem?

A I am a little nervous once in a while.

Q You stutter?

A Stutter, yes.

Q Stammer?

A Yes.

Q How long have you had this?

A Since about 1940.

Q Have you ever been a courtroom before?

A No.

Q How far did you go to school?

A Ninth grade.

Q Then did you go to work?

A Yes.

Q Were you in the Armed Forces of the United States?

A The army, yes.

Q When was this?

A In 1947.

Q What kind of discharge did you get?

A Medical discharge for my stuttering.

Q What do you do for a living?

A Longshoreman.

Q How long have you been a longshoreman?

A Since 1946.

Q Since 1946 until now, have you had any other kind of job other than a longshoreman?

A No other job.

Q When you work as a longshoreman, what kind of job do you have?

A Down the hold. I am a hold man.

Q And that means that you work inside the ship loading and unloading cargo?

A Right.

Q Are you a member of a regular gang?

A Yes.

Q Are you a member of a regular gang now?

A Yes.

Q What is that gang's name?

A Anglo -- I don't know his last name too good.

Q Just relax, Mr. Bernardini and be calm.

Back in 1969, were you a member of the same gang?

A Yes.

Q On October 28, were you a member of the gang at thattime?

A In that gang, no.

Q On that day, did your gang have any work?

A We had no orders that day.

Q So what did you do that morning?

A I went to the hiring hall to get hired.

Q What was the purpose of going to the hiring hall?

A To work.

Q To shape up?

A To shape up.

Q Are you told the night before that your gang isn't going to have work?

A Yes.

Q When you go to shape up, are you then assigned to different gangs, different piers than you normally worked?

A You had to go to the hall and shape up.

Q When you went to the hiring hall, were you given a job?

A Yes.

Q Where did they tell you to go?

A ITO.

Q Where did they tell you to go to ITO?

A I was hired for the whole job.

Q What pier?

A 21 Street, Brooklyn.

Q Just relax. When you got to the pier at 21 Street, did you go to the timekeeper's office?

A I went to the timekeeper's office.

Q Did you show him your card?

A I had my hiring card.

Q What did he tell you to do?

A To go to number four hatch.

Q On board the Svensksund?

A Yes.

Q When you got to the ship, how did you go aboard?

A I went up the gangway, then I went left. Then I was looking for the ladder.

Q When you got on the deck, did you go to what you thought was number four hatch?

A Yes.

Q Had you ever been on that ship before?

A Never.

Q Have you ever been on since?

A No.

Q When you got to this hatch, was there a coaming around it?

A Yes, a high coaming.

Q Approximately how high did the coaming go from the deck?

A Three feet probably, roughly three feet high.

Q Show us on your body about how high.

MR. STEARNS: I don't think that is necessary.

THE COURT: Nor do I. I think the jurors can visualize three feet with the average man being in the neighborhood of five and a half to six feet.

THE WITNESS: About three, four feet.

THE COURT: The witness just said something.

THE WITNESS: It is roughly three, four feet. It is up to here. It is hard to see over the deck.

THE COURT: The witness has indicated that the coaming came up to his chest.

Q And this coaming is sort of like a wall around the hatch opening?

A The whole hatch, right.

Q When you came over there, were you looking for the ladder to go down into the hatch?

A Right, to get into the hatch.

MR. TESTA: Your Honor --

THE COURT: Yes. From this point on I assume the objection is to leading, is that correct?

MR. TESTA: Yes.

THE COURT: I have been listening and I have considered the matter up to now introduction but from this point on, I will ask counsel to carefully frame his questions so he doesn't lead the witness.

Q When you first came over to the coaming or the hatch, what part of the hatch did you walk over to?

A To the left.

Q Would that be where my finger is on this diagram on the blackboard?

MR. STEARNS: Objection to the form of the question, leading.

THE COURT: Perhaps if the witness would be permitted to step down and trace his path on the board, that might be easier rather than you do it and lead him.

Is that satisfactory?

MR. AUSLANDER: Yes.

Just for the record, your Honor, may I indicate

this diagram verbally?

MR. TESTA: If your Honor please, I think if counsel drew a small diagram and marked it.

THE COURT: That can be done later on. A large diagram will be helpful to the jury so they can see. Then if you wish to prepare, either counsel wishes to prepare a small diagram which can then be marked as an exhibit, I will entertain that offer at the time it is made but I think for the jury's purposes, it is best they see the matter themselves.

Q This area down here in the lower part of the diagram, would that be the pier, the dock?

A That is the pier. This is the gangway over here.

Q The ladder on therighthand side, that is the gangway going from the pier to the ship?

A Yes.

Q And this side of the ship, would that be what is called the inshore side?

A The inshore side.

Q And this side of the ship at the top of the diagram?

A The offshore.

Q And this square inthe middle?

A That is the coaming.

Q This line around it?

A Right.

Q Show us when you got off the gangway, in what direction you first walked?

A When I got off the gangway I walked to my left.

THE COURT: Try to keep your voice up.

MR. STEARNS: And with a piece of chalk.

THE COURT: If you would.

A I walked over here. There was a man over here --

Q When you first came over here, did you look down into the hatch?

A I looked over and I couldn't see the hatch.

MR. TESTA: Your Honor, in order that the record may be straight, instead of saying here and where, can we indicate where this particular spot is that the witness has referred to as "h e"?

Q When you walked over to this portion which we will call the inshore corner of the hatch.

MR. TESTA: That is the forward.

THE COURT: Forward starboard corner of the hatch.

Am I correct that looking to the right of this diagram, you are looking forward on the vessel?

MR. AUSLANDER: That is right.

THE COURT: Am I correct, Mr. Bernardini, when you

got off the gangway, you walked left toward thenumber four hatch and you arrived at the forward starboard corner of the hatch?

THE WITNESS: Right.

THE COURT: Would you proceed to describe what happened after that?

Q When you got to this portion at the forward starboard corner of the hatch, did you look into the hatch for the ladder?

A Yes. I couldn't see the ladder.

THE COURT: Keep your voice up so the jurors can hear you.

Q When you say you couldn't see the ladder, what did you do then?

A There was a man over there rigging up.

Q When you say over there, are you indicating --

A The offshore side.

Q The offshore side of the hatch?

A Yes.

Q And you saw a man rigging up?

A Yes.

Q What do you mean?

A He was rigging up the boom. The boom was offshore too much or he had to go on top of the boom.

Q What did you see him doing with his hands?

A Pulling lines.

Q And you say you walked over to this man?

A Right.

Q And this figure here, would that just about designate where the man was standing?

A Roughly.

Q That figure was on the offshore port side of the hatch near the forward portion of the hatch?

THE COURT: About how far was the man from the forward edge of the hatch?

THE WITNESS: About 15 feet, ten feet.

Q Did you have a conversation with that man?

A I asked him where is the ladder and he said on the other side and he pointed.

Q Where did he point generally?

A He pointed this way.

Q Show us on the diagram approximately where he pointed?

A He pointed over there. He was rigging up.

THE COURT: Let the record show that the witness by hand motion indicated in the direction of the aft starboard portion of the hatch.

MR. TESTA: If your Honor please, I think he

indicated the starboard side in the middle, not the aft portion.

THE COURT: Could you put an X please where the man pointed?

THE WITNESS: He waived to this side.

THE COURT: Put an X in the direction in which he waived.

The witness has made an X on the starboard side of the hatch a little forward of the after portion of the hatch on the inshore side.

Q After he waived in this general direction, what did you do next?

A Then I kept walking.

Q Show us the direction that you walked?

A I kept walking.

THE COURT: The witness indicates he walked aft on the offshore side of the deck, is that correct?

THE WITENSS: Right.

Q Then what did you do?

A I continued walking.

Q Now you are walking across the ship toward the inshore side?

A I was looking for the ladder. When I went over there I didn't see no ladder, there wasn't a ladder there --

MR. TESTA: Can we have the witness indicate the course he took behind the number four hatch?

THE COURT: If you would draw a line with the chalk, starting up there where the man was standing and trace the pathyou took as you walked.

THE WITNESS: I didn't see no ladder there then I saw somebody over here.

Q When you say over here, where are you referring?

A He was about over here.

Q Make a circle.

MR. AUSLANDER: May I erase my former figure?

MR. TESTA: Can we have the record show where that circle is?

Q The circle is approximately on the inshore side of the hatch around the middle, although this isn't drawn to scale obviously.

THE COURT: In any event you saw a man standing at the point which you marked with a circle?

THE IWTNESS: Right.

Q When you saw that man, what was your intention?

A To ask him where the ladder was. I continued walking and I heard a noise with the boom.

Q Where were you when you heard the noise with the boom?

A I was just about making a turn.

Q What did you do when you heard the noise with the boom?

THE COURT: Would you mark the point you were at when you heard the noise of the boom with a letter Y.

The witness has indicated a point at the aft starboard corner of the hatch on the inshore side.

Q When you heard that noise, what did you do?

A I looked over there at the boom.

Q Which directiondid you look?

A Across the hatch offshore.

Q What is the purpose of looking there?

A Because I heard the noise from the boom.

Q What did you do then after youheard the noise of the boom and looked in that direction?

A I looked over there and I saw that everything was all right then I continued walking. As soon as I walked a little more I saw some grease and when I saw it, it was too late. I was dodging and I tripped and I slipped over here on the pallet and spinned around and hit my right shoulder on the corner.

Q Would you please make believe that this table is the aft end of the hatch and make believe, if you were, that you were making this journey around the hatch and you were then

going to start going forward towards where this man, the circle is located on the diagram on the inshore side.

Would you show the jury please how you walked, how you made your turn, the sound that you heard, the way you looked and how you continued to proceed and had your accident?

A I was walking --

MR. STEARNS: Indicating he is walking around the table with the coaming at his immediate lefthand?

A I heard a crackle. I looked.

THE COURT: At the point you heard the noise, which direction were you facing, were you facing forward or some other way?

THE WITNESS: Forward. I was just making the turn when I heard the noise, when the falls are made tight it rattles to take a little lack in the guidelines.

THE COURT: You were making a turn around the aft end of the hatch to go forward?

THE WITNESS: Right, to find the ladder.

Q Continue.

A When I came back there was some grease there. I saw it too late and I tried to dodge it.

MR. TESTA: Can we get an exact location?

THE COURT: I think that is really for cross examination.

Q Just continue if you would, how you came around. We interrupted you at the moment where you came around, you heard the noise, you say you looked up then you continued?

A I continued walking. Then when I looked down it was too late, there was some grease there and I slipped and when I hit the pallet I spinned on the pallet and hit my right shoulder on the coaming.

Q Did you fall on the pallet?

A I fell on the pallet.

Q Would you describe what the pallet is? What is a pallet?

A It is where they put cargo on.

Q To put cargo on?

A Right.

Q Approximately what is the size of a pallet?

A An average size is about four by six average.

Q About how high off the ground or deck would be the top of the pallet?

A One pallet should be maybe six inches high, six to eight inches high, roughly.

Q Where did you see these pallets extend from, from where to where?

A From the coaming to the side of the ship.

Q Are you indicating the coaming on the inshore side?

A To the railing.

Q Approximately where it is shown in this diagram?

A Right.

Q About how many pallets did you see there?

A Roughly six to eight pallets.

Q Were they one alongside each other or howwere they arranged?

A Some were one high and the rest were two high.

Q One on top of another?

A Yes.

Q What were these pallets used for in the position that they were on the deck as you saw it that morning?

A The coaming on the ship was too high so they put the pallets there so the man can look into the hold.

Q What was that man?

A The man on the deck.

Q Does he have a title or name?

A Yes.

Q What was it?

A Gangway man.

Q Is that the same as signal man?

A Signal man. The same.

Q What is his job?

A His job is to walk to the hold of the ship and the

side of the ship where to pick up the pallets and how to load the pallets.

Q Is his job to give signals to the winch operators?

A To the winch men, right.

Q When to raise or lower?

A Pick up the cargo or lower the cargo.

Q After you fell onto the pallet and struck your shoulder, what did you do?

A I hollered to the mater over there that I just fell and he said all right. Wait over there and I will call somebody.

Q Did somebody come?

A Yes.

Q Who was it?

A The foreman of the ship. The foreman.

Q What if anything did you feel at that time?

A My shoulder was swollen. It was very swollen. A lot of blood was on it.

Q Did you have any pain?

A A lot of pain.

Q What portion of your body?

A The top of my right shoulder.

Q Did you take a look at the deck again where you say you had slipped, after you got up from the pallets?

A I was too nervous to do anything after that, I was too nervous.

Q I am asking did you look at the deck?

A Later on, yes.

Q What did you see?

MR. TESTA: Objection.

THE COURT: What is the objection?

MR. TESTA: As to what he saw afterwards and where he saw it.

THE COURT: I will overrule the objection. I will permit you to inquire on cross examination.

You are lying on the deck. You fell and hurt your right shoulder.

THE WITNESS: Right.

THE COURT: Did there come a time when you got up?

THE WITNESS: I got up after that and I went to the timekeeper's office.

THE COURT: Between the timeyou got up and the time you went to the timekeeper's office, did you look at the deck?

THE WITNESS: After a while, yes.

THE COURT: You may proceed.

MR. TESTA: If your Honor please, I would object to when he says after a while unless there is some time

element.

MR. AUSLANDER: I will go into that.

Q After you fell and you are lying on the pallets, you say you got up?

A Right.

Q Just yes or no, did you look at the deck where you say you slipped?

A Yes.

Q How long after you fell was it that you looked at the deck?

A A couple of minutes.

Q When you looked at the deck, what did you see?

A The heel marks of oil and stuff on deck.

Q Heel marks in the oil?

A And grease.

Q What did the heel marks look like?

A Like there was a lump of grease that somebody put their heel on or slipped on it.

Q What was the color of the deck?

A Dark.

Q Gray, black, brown?

A Gray, I think.

Q What was the color of the grease or oil?

A It was a light color grease. When you splatter, it

is hard to see.

Q After you got up, you went to the timekeeper's office?

A Yes.

Q The same one you reported to in the morning?

A Yes.

Q Was it the same man or a different man?

A The same man.

Q Did you tell him anything?

A He said what happened and I said I fell on the deck. I told him I wanted to go to the doctor.

MR. STEARNS: Objection. The response is not responsive to the question.

THE COURT: The question is what did you tell him.

THE WITNESS: He asked me what happened. I said I fell onthe deck, I wanted to go see a doctor.

THE COURT: Overruled.

Q Did he send you to a doctor?

A He sent me to a doctor.

Q Did hegive you some kind of card?

A A slip to see the doctor.

Q What doctor did you go see?

A Dr. Tagliagambe.

Q Did you go to his office?

A I went to his office.

Q When you got to his office, what if anything did he do for you?

A He took X-rays of my shoulder and I got some pills, a pain killer and he put some salve on it.

Q Did you get bandaged?

A Bandaged.

Q Did you have to take off your shirt?

A My shirt and jacket.

Q When you took off your shirt, did you look at your shoulder?

A Yes.

Q What did you see?

A It was full of blood and swollen, scraped up.

Q How did it feel?

A Very apinful.

Q Then did you go home from his office?

A Yes.

Q Did you see him again?

A I saw him the next day. Wednesday I saw him.

Q Approximately how many times did you see him the first time?

A Twice.

Q Did he then tellyou you had to go back to work?

A I went down to him Wednesday and he said I had to go back to work.

Q How were you feeling at that time?

A I told him I still had pain and stiffness.

Q What kind of pain?

A I told him I couldn't pick my arm up too much. I had sharp pain.

Q What did he say?

A He said I should go back to work and try it.

Q The job you have as a longshoreman, is that a physical job?

A Yes, picking up cases.

Q Carrying stuff?

A Carrying stuff.

Q How much weight on the average do you have to pick up or carry?

A Sometimes bags weigh one hundred pounds.

Q But he told you if you had to go back to work and you weren't feeling well, what were you doing?

A I called my lawyer.

Q Did he send you anywhere?

A To the labor board.

Q At the labor board, that is the Department of Labor?

A Yes.

Q Were you examined by another doctor?

A Yes.

Q At the labor board?

A Yes.

Q What did he say?

MR. STEARNS: Objection unless he can testify --

THE COURT: Yes, sustained.

You were examined at the labor board?

Q After you saw the doctor at the labor board and he examined you, what part of your body did he examine?

A He examined my shoulder.

Q How was your shoulder at that time?

A It was still swollen.

Q Did you go back for more treatments?

A He said to go back for more treatments.

Q Did you go back to Dr. Tagliagambe?

A I went back to Dr. Tagliagambe.

Q How long altogether did you have treatment from Dr. Tagliagambe?

A Approximately six weeks.

Q During that period of time that you were getting treatment, were you working?

A No.

Q Did you receive your salary while you were out from work?

A No.

Q At that time, how much were you earning a week?

MR. STEARNS: Objection. The best evidence of this is his earnings record.

MR. AUSLANDER: That is not the best evidence.

THE COURT: Overruled. If he can tell us what he was making, you can inquire on cross.

Q How much money were you making a week at that time?

A Approximately $180, 190.

Q When you went back to work, you finally did go back to work, that was after six weeks, did you work steadily after that?

A I didn't work steadily.

Q Why not?

A If I had pain in my shoulder and the wind was strong, I couldn't work.

Q How did your shoulder feel when it was raining or snowing?

A Very bad.

MR. STEARNS: Objection to the form of the question as leading.

THE COURT: It is leading. Strike the answer. The

jury will disregard it.

Q How did your shoulder feel upon weather changes?

A When it was bad, my shoulder would bother me all the time.

Q When you say bother you, how would it bother you?

A Sharp pains and like stiffness.

Q After you went back to work, did you have any medical treatment?

A Yes. I had to put heat treatment on myself and I would do it when it bothered me.

Q You took self-help?

MR. STEARNS: I object to the answer as not responsive.

THE COURT: Did you have any outside medical treatment besides any heat treatment you may have given yourself?

THE WITNESS: No.

Q You gave yourself ?

A Yes.

Q And this was a heating pad?

A Heating pad.

Q What else if anything did you do for your shoulder when it was bothering you?

A Sometimes I would put wintergreen on it.

Q Approximately how many days did you miss after you

returned to work because of these problems with your shoulder?

A In the wintertime, about 15, 18, 20 days, roughly, up until about March.

Q What were you wearing that day?

A I had a winter jacket on, like a windbreaker and my work clothes. I had high shoes.

Q What kind of soles?

A Neolyte.

Q Regular working shoes?

A Regular working shoes.

Q Anything happen to your jacket?

A It was ripped.

Q Where?

A On the shoulder.

Q Was that as a result of your fall?

A Yes.

MR. TESTA: Objection.

THE COURT: Sustained. Disregard that last answer.

Q How did the jacket get ripped.

A When I hit the side of the coaming it ripped.

Q Is that coaming made out of metal?

A Metal, yes.

Q Did you ever hurt your shoulder before this date?

A No.

Q Have you ever hurt your shoulder since that date?

A No.

Q How does your shoulder feel today?

A I still get pain in it once the weather is bad.

Q Howabout when you do heavy work?

A When I do heavy work, when I have to handle coffee, I could handle it for a while and I had to stop. I had to go home quite a lot.

Q How much does coffee weigh?

A 130, 160.

Q A bag?

A Roughly.

MR. AUSLANDER: No further questions.

CROSS EXAMINATION

BY MR. STEARNS:

Q Mr. Bernardini, if there is any question I ask you that you don't understand, just indicate. Don't attempt to answer anything that you don't understand.

A All right.

Q You remember being in my offices May 6, 1971?

A Yes.

Q At that time I asked you a great number of questions about this accident that you claim?

A Yes.

Q You gave me answers?

A Yes.

Q At that time you were testifying under oath, isn't that so?

A Right.

Q Just as you are testifying under oath now?

A Right.

Q Mr. Bernardini, about what time was it when you went to board the Svensksund?

A About a quarter of eight, quarter of nine.

Q That was after work had begun, wasn't that so?

A Yes.

Q What was the reason for your being that late?

A Because I got hired at the hall. By the time you get checked out -- they start hiring the hall about 8:00. By the time we get to the pier, it is about 8:30. Then I went to see the timekeeper and the timekeeper told me I had to go to number four hatch.

Q You say you had never been on the ship before?

A No.

Q When you boarded the ship, you went up the gangway?

A Yes.

Q You understand, don't you, that this ladder outline drawn on the right base of this diagram is the gangway?

A Right.

Q Actually that would face in a different direction, it wouldn't be straight on?

A Right.

Q You got to the head of the gangway and you made a lefthand turn?

A Right.

Q And you walked over to the forward inshore, which is also the starboard corner of the hatch, isn't that so?

A I walked aft.

Q You walked in an aft direction, is that what you are saying? You walked along this way indicating aft then you walked over to the corner?

A Right.

Q Did you see anybody there?

A There was a mate on the gangway but I don't know if he was going up or down.

Q The mate was over at the corner, wasn't he, the same corner?

A No, he wasn't there. He was by the gangway.

Q How far was it from the gangway to this corner?

A See the line on that picture, that line shouldn't

be there because there is a big space there.

Q What line are you referring to?

A The ladder was there. When I went onto the gangway, he was standing on the left of it.

Q You are telling me the mate was standing at the head of the gangway?

A Not the head. The way the gangway is, he is on the lefthand side of it. It wasn't on top of the walkway.

Q He wasn't standing far from the gangway?

A No.

Q How far from it was it?

A A couple of feet, roughly.

Q So from here to the gangway, he is a couple of feet away?

A Yes.

Q This gangway leads up into a passageway that is called the midship house passageway.

A Are you talking about inside?

Q No, outside, but in an area adjacent or right alongside the midship house.

A The house is back further.

Q The house stretches from here to there, isn't that right?

A Right.

Q How far was it from the head of the gangway --

A Where the thing was. The line where the hatch is. Roughly over there.

Q You are saying over here?

A Yes.

THE COURT: Why don't you draw an M because it was the mate.

THE WITNESS: When I got hurt he wasn't standing in the same spot.

THE COURT: When you first got on the ship, when you first saw the mate, where was he?

THE WITNESS: He was standing there.

Q That is two feet from the head of the gangway, isn't that so?

A That is the first time I was on that ship so I can't recollect. I don't think you take a picture of the ship.

Q When you got to the head of the gangway to go onto the ship -- when you got off the gangway, it was two feet away?

A All right.

Q Is that accurate, he was two feet from the gangway?

A Yes.

Q How far was he from the end of the midship house passageway?

A After the accident or before the accident?

Q At the time you first saw him.

A I didn't take notice.

Q You don't know where he was?

A I didn't take notice.

Q Was he two feet from the head of the gangway?

A I didn't take notice. I just went up the gangway, I saw the man there, not that I took a picture where he was. When you go up the gangway the first time, you don't take a picture of the ship.

Q Can you testify how far he was from the head of the gangway when you first saw him?

MR. AUSLANDER: This has been answered a number of times. At first he said a couple of feet then in response to Mr. Stearns' further questions he said two feet approximately.

THE COURT: Mr. Reporter, would you read back the last question to the witness and I will ask the witness if he would answer it one more time.

(Record read.)

THE WITNESS: When you go up on a ship there is usually a mate standing there. You don't take notice. You don't measure. You don't figure your accident is going to happen.

THE COURT: Can you tell us how far away he was, approximately how far or don't you know?

THE WITNESS: It wasn't in my mind. By the way to the left of the gangway.

THE COURT: Are you telling the jury and me that you don't know how far from you?

THE WITNESS: They always stay by the side over there --

THE COURT: Not as it was in other situations. In this case, as you came aboard the ship, how far was the mate from the gangway?

THE WITNESS: He was a couple of feet, roughly.

Q You walked left and you walked a distance in the midship house passageway?

A I could be wrong because I didn't take a picture of the whole ship.

Q We don't want you to make a mistake.

A I didn't make a picture when I went on the gangway. I went up to go to work and I saw the man. You don't take a picture.

Q That is not the question.

When you saw the mate, you were walking aft?

A Right.

Q How far did you walk after you got out of the

midship house passageway?

MR. AUSLANDER: There has been no tetimony yet that there was in fact a midship house passageway.

THE COURT: Sustained.

Q On this ship, the Svensksund, on the day as it was when you said you had an accident, was there a passageway alongside the midship house?

A I don't remember. All I remember is I went up the gangway and was going to the number 4 hatch.

Q You don't know whether there was a midship house passageway?

A I said that there was a midship, that is where the cook, the people stay.

Q Mr. Bernardini, whatever you call it, at this point --

A That is the midship.

Q When you got off the gangway, you were right next to or near the midship house, isn't that so?

A I didn't take notice because I know the midship is there.

Q When you got off this gangway, if you hadn't made a left and you walked straight ahead, would you have walked into a wall?

A No.

Q In any event, you walked left and you then went where is this,where did you go after walking left?

A I went to number 4 hatch.

Q How far was it from the gangway to the number 4 hatch, approximately?

A You think I took a picture of the ship?

Q Do you have any idea?

A All I know is I got off the gangway, I walked to the number 4 hatch.

Q Do you have any idea how far you would have walked?

A I saw one man rigging up on the other side. That is all I can remember. As far as the accident happened, I can't say this or that. I can only testify to my recollection.

Q Can you tell us how far you might have walked from the head of the gangway to the number 4 hatch?

A Offhand, I don't know. I said I went that way.

Q Will you just try to answer the questions. If you can't answer, say you can't.

A I don't know what you are trying to get at.

Q Do you know how far you walked?

A I walked to number 4 hatch.

Q Do you know the distance that you walked to get to the number 4 hatch?

A It happened too fast.

Q So you don't know the distance.

You walked over to the forward inshore corner, is that not so?

A Not on the side. On the thing, on the side. On the inshore side.

Q Did you walk over to the forward inshore corner?

A Right over there. As soon as I got on the ship, I asked the man--

Q Just answer the questions you are asked.

Did you go over to the forward inshore corner?

A Yes.

Q Did you look over the side?

A Yes. Didn't see no ladder.

Q You said this coaming was three feet high?

A I had to step up high. You could see the ladder from the top.

Q Could you see there was a ladder by walking over to the corner and looking over the coaming?

A Not from this side but I could see to the other side.

Q This side here?

A You could see it. I didn't see no ladder here.

Q Could you see this side?

A No. I looked straight ahead and I walked over there.

Q Could you see that side, indicating the offshore side of the coaming?

A No.

Q How about the aft edge, could you see that?

A No.

Q When you walked along this way, could you now see this aft side of the coaming?

A I didn't look no more over the side. I went to the guy riggin up.

Q You didn't look anymore?

A No.

Q And this coaming you say was three feet high?

A No.

Q You went from the midship line which is this line from the top to the bottom and the forward coaming of the number 4 hatch, is that not so?

A Yes.

Q The coaming at that point was on your left?

A Yes.

Q Did you see any ladder in this area, the area between the forward edge of the coaming and the aft edge of the midship house?

A No. I didn't know where the ladder was.

Q Did you see any ladder there, did you see anything

there?

A No, no ladder.

Q Did you see any other equipment there?

A No.

Q Perfectly clear?

A On that side.

Q Nothing in between here, from here to there?

A No.

Q No ladder, no structure built onto the deck?

A There might be something like they put a pipeline there. It might have been there. I was looking for the ladder. I didn't even pay attention to that.

Q Other than the pipe that might have been there, there was nothing else?

A No.

Q You walked over and made another left turn, is that not so?

A Right.

Q Now you are on the offshore side and you are between the offshore coaming and the offshore side of the ship?

A Yes.

Q You make a lefthand turn and you see a longshoreman?

A Right.

Q Did you have a conversation with him?

A I asked him where is the ladder. I said is this number 4 hatch and he said are you a holdman and I said yes, and I said where is the foreman and I said where is the ladder and he said on the other side.

Q He waved in a direction on the opposite side?

A Yes. I went to the other side and I saw no ladder.

Q When he pointed, did you look in the direction he was pointing?

A I was walking around.

Q Did you look in the direction which he was pointing?

A No.

Q What in words can you say he said to you?

A He said are you the holdman, I said yes. I asked him where the ladder was and he said on the other side and he pointed to it.

Q And you continued to walk aft?

A Yes.

Q You got to the offshore aft corner of the hatch and you made a left turn, is that not so?

A Yes.

Q Didyou walk over this way to the forward coaming?

A I didn't look anymore. I looked already and I went to the other side.

Q What was the purpose of your walking around the hatch?

A He said it was around there so I went around this way.

Q What was your purpose in going to the other side?

A Looking for the ladder.

Q While you were doing it, you weren't looking for the ladder?

A Right, because it was on the other side.

Q While you were looking for the ladder, you weren't looking for the ladder?

MR. AUSLANDER: I will object to the form of the question.

THE COURT: Is there a pending question? I didn't think that last comment was a question and there isn't any answer to it.

I will sustain an objection as to form.

MR. STEARNS: I will withdraw it.

Q You are walking along going aft?

A Yes.

Q You are walking, are you not close to the coaming?

A A little away from the coaming. Not close to the coaming.

Q This is the coaming. The coaming is on all four

sides?

A Walking in the middle, roughly.

Q You are walking in the middle, roughly.

You testified that you came, Mr. Auslander asked you to consider the table the coaming and you are walking around and you make still another left turn, that is when you come around the corner, right?

A Right.

Q And you walk along all the way down to the inshore aft corner, isn't that so?

A Yes.

Q While you are walking along there, you have the coaming on your lefthand side?

A Yes.

Q Much as you indicated coming around here, this is the offshore coaming, this is the aft offshore coaming?

A Yes.

Q How far were you from the coaming?

A About a foot or so.

Q You are walking along with your lefthand side adjacent to the aft coaming of the hatch and you are about a foot from it and you are walking along?

A Yes.

Q And you continue walking, no incident, no trouble,

until you get to this corner.

That is the inshore aft corner?

A Right.

Q Do you make that turn before your accident?

A Sure, I made the turn.

Q You got around the corner, right?

A Right.

Q You passed very close to the edge of the corner?

A Right.

Q You are walking along then you said something about a crackle?

A No, they were fixing the boom.

Q What did you hear?

A The crackle. They were tightening the falls.

Q What did you do when you heard the crackle?

A I looked up, I looked over there.

Q How far were you at the time you heard the crackle, how far were you from the corner which again is the inshore aft corner when you heard this crackle, were you past the turn or what?

A I had already made the turn.

Q How far were you from the corner?

A A couple of feet.

Q So now you were walking in this direction going

forward again, isn't that so?

A Yes.

Q At that time the coaming, the inshore coaming is to your left?

A Yes.

Q The rail is to your right, the inshore rail, is that not so?

A Yes.

Q You hear the crackle a couple of feet after going around the corner?

A Yes.

Q You continue walking?

A I stopped to look then I continued walking.

Q Let me get this step by step. You heard the crackle and you stopped?

A Yes.

Q What did you do next?

A I stopped.

Q You looked up and saw everything was all right?

A I heard a noise. They were tightening the booms.

Q You heard that noise many times before?

A I looked because of curiosity.

Q Now you are walking and you are walking forward, is that not so?

A Walking forward but my mind was on the boom over there because they were tightening it up and how many times do you see the boom fall, many times.

Q When you made it around the turn, you were two feet from the corner, you heard a crackle and you looked and you saw them tightening it?

A And I turned around to continue walking --

Q Let's go through this again --

MR. AUSLANDER: Objection. He is not permitting the witness to finish it.

THE COURT: I think we should have the answer finished.

MR. STEARNS: May I have the question read back and the answer?

(Record read.)

MR. STEARNS: It seems I had not finished my question.

THE COURT: Let's strike the last answer. The jury will disregard it. Put your answer in totality.

Q When you made the turn and the corner was a couple of feet behind you, you heard the crackle and you stopped?

A It took my mind off. I looked up.

Q You saw everything was all right, is that right, is that what you testified to?

A I looked up.

Q Everything was all right?

A Do you want me to answer the question or part by part?

Q You looked and everything was okay?

A As far as the boom point of view, yes, they were tightening it up.

Q So you started walking again, is that not so?

A Right.

Q At that point when you started walking again, did you see anything on the deck?

A I saw it too late as I explained to you before.

MR. STEARNS: Can I move to strike that answer?

THE COURT: Yes.

Let's go back. When you started walking, did you see anything on the deck?

THE WITNESS: I saw pallets over there.

THE COURT: Did you see anything else on the deck?

THE WITNESS: I started to walk, I heard the crackle. I looked up and I started walking again and as I looked down, I saw a bunch of grease there and I tried to dodge them and I slipped and I fell on the pallets over there and I twisted around. I slipped and hit my right shoulder.

MR. STEARNS: Could I inquire about the details of

this occurrence?

THE COURT: Of course.

Q When you started again, you were two feet from the corner, is that not so?

A Give and take.

Q At that point, what if anything did you see on the deck?

A When I looked down?

Q When you started walking, what did you see on the deck, if anything?

A There was a bunch of grease there. I tried to dodge them.

Q As you started walking, you saw grease, is that right?

A Right.

Q You started walking and you tried to dodge the grease, is that what you are saying?

A To step over them.

Q And you were taking tippy-toe steps?

A Trying to dodge them.

Q Didn't you use that expression that you were using tippy-toe steps?

A When we were at that meeting in May, that is the way you described it.

Q Did you use those words?

A I said I was tip-toeing trying to dodge them.

Q You were two feet from the edge of the coaming, you are tip-toeing and what happens?

A I tried to dodge one and I slipped on one of them.

Q How many steps did you take successfully dodging them, dodging this grease? How many tippy-toe steps did you take?

A Two, a couple. There were blotches.

Q Perhaps you didn't hear me.

MR. AUSLANDER: He said a couple. Maybe you didn't hear him.

THE COURT: His question is how many steps did you take?

A As I looked, a couple of steps and I saw other blotches and I tried to dodge it and I slipped on my left foot and I fell down. I twisted my body and tripped over the pallets and hit my shoulder. I still don't understand what you mean by how many steps?

Q You indicated by an X?

A That is roughly.

Q That is why I am asking you the questions. How many steps did you take after you started walking again after you heard the crackle?

A I don't count them.

Q One?

A I can just say how the accident happened. I can't say how many feet, three feet, four inches.

Q How many steps tippy-toeing through what you claim is grease --

MR. TESTA: I will object to continuous use of the word tippy-toeing. I don't think the witness has said this and I think this word being used in a sentence --

THE COURT: Are you objecting to the form of the question?

MR. TESTA: Yes.

THE COURT: Sustained.

MR. STEARNS: I believe he did use the word dodging.

THE COURT: Yes, he certainly did. He tried to dodge the grease. That is what I heard him say.

Q How many steps did you take, Mr. Bernardini, while trying to dodge the grease before you slipped?

A If I answer that question I will be lying because I explained how the accident happened. I can't say how many steps. I can just say what happened to me.

Q Do you know how many steps you took? Tell us how many steps you took, or don't you know?

A All I can say is how the accident happened. I can't

say how many feet from there, how many feet from there. I can't tell you that because I don't know.

THE COURT: All right, let's proceed.

Q When you slipped, what happened to you?

A I twisted my body and hit my right shoulder on the coaming.

Q As I understand you are walking along going forward on the inshore side between the inshore coaming and the rail, is that not so?

A Yes.

Q You slipped -- in which direction did you fall?

A I twisted -- do you want me to make a plan how I did it?

MR. STEARNS: Could we have the witness demonstrate how he did this fall?

THE COURT: Yes, you may.

Would you step down, Mr. Bernardini?

A I twisted, I slipped and when I went down.

Q Do it.

A I am no actor.

Q Is that so.

THE COURT: All right, gentlemen, let's have questions and answers.

Q Would you simulate as best you can how this fall

occurred?

A It happened so fast. I twisted, I slipped, I twisted and I tripped over the pallets and hit my shoulder against the coaming of the ship.

Q Did you slip first or did you trip first?

A I slipped.

Q Then you tripped?

A I slipped on the grease.

Q Did you trip on the pallets?

A No.

Q You fell to your left and you twisted?

A I twisted my whole body and I fell on my back.

Q When you slipped, tripped, twisted, your right shoulder struck against the coaming, is that what you are saying?

A Yes.

Q That is the only part of your body that you hurt?

A Yes.

Q You didn't hit your head?

A No.

Q You are walking along here, you are walking forward now, you have this slip, trip, twist --

MR. TESTA: Again I have to object. The witness said he did not trip.

THE COURT: I heard him say that also. I think that the objection is as to form and I will ask counsel to rephrase his question.

Q You claim to have struck your right shoulder against the coaming?

A Right.

Q Which at the time this began was on your left?

THE COURT: As you were walking, on which side of you was the coaming?

THE WITNESS: On the left.

Q As you were walking when you had the accident --

A I slipped on the grease. I tripped over the pallet and I spinned around and hit my right shoulder on the coaming.

Q At the time you had this accident, what you say is an accident, where was the mate?

A He was next to the coaming. I couldn't say -- right next to the coaming on the inshore side of the ship.

Q Where the accident happened?

A Down further.

Q Over here?

A On the offshore side -- the inshore side.

THE COURT: Would you draw an M and put a 1 next to it to indicate the place where the mate was standing when you slipped?

A Roughly over here. This ladder is down further.

Q Can you estimate on this diagram?

A The ladder is here but he was on this side of the coaming.

Q Did you draw an M where he was?

A When the accident happened, I saw him.

Q You can't tell us where he was?

A On this side.

Q Did you tell me at your deposition that he was watching you?

A I don't know if he was watching me, but he was there.

Q Did you tell me on your deposition that he will say that I did not fall?

THE COURT: You say it looked to you like he was watching, that he was looking at you?

THE WITNESS: He was facing the hold of the ship, he was watching.

THE COURT: Did your eyes meet his eyes?

THE WITNESS: Not necessarily.

THE COURT: Did you see the back of his head, the side of his head or his face?

THE WITNESS: The front.

Q Did you tell me that you knew that the mate would say you had not fallen?

A When we made that question in May, I don't know it came up. Yes, I said something like that because you said you had a witness the mate and I said naturally he will say that.

Q Shall I read the question to you?

MR. AUSLANDER: Objection. He has not denied he said it.

THE COURT: Do you recall being asked some questions about the mate?

THE WITNESS: I said that.

THE COURT: What did you say?

THE WITNESS: I said he will probably say I didn't get hurt on the ship. I have that in the report.

Q Mr. Bernardini, do you remember being asked on this deposition on May 6, 1971 the following question and giving the following answer.

THE COURT: May I have a copy of that?

MR. STEARNS: Mr. Auslander has the original. He has never returned it to us.

THE COURT: Please.

MR. STEARNS: Page 31, line 22:

"Q Then you fell. Which way did you fall?

"A I fell this way (indicating).

"Q Indicating that you fell forward, is that

right?

"A Right."

At this deposition, did you tell me simply that you had fallen forward?

A Forward and I twisted.

MR. AUSLANDER: Just a moment. If your Honor please, Mr. Stearns just read a question and he read an answer. All he is required to do is ask him did you say that and did you answer that, that is all.

THE COURT: Overruled. The witness has already answered the question, Mr. Auslander.

Q Did you tell me at that time that you twisted?

MR. AUSLANDER: Were you asked.

THE COURT: Please.

The jury heard the questions that were asked and they heard the answers and they can draw certain conclusions for themselves what he was asked, what he answered and what he wasn't asked.

You will have a chance if you wish later to ask questions, sir.

You may proceed, Mr. Stearns.

Q Did you receive a medical discharge?

A Yes.

Q On May 6, 1971, page 5 line 23, beginning line 21:

"Q Were you honorably discharged?

"A Honorably discharge."

THE WITNESS: That is because I was nervous.

"Q Was it a medical discharge?

"A No, a medical discharge under honorable conditions."

When I asked you that question, did you give me that answer?

A I said under medical conditions.

Q I asked you flat out whether you got a medical discharge.

A I told you an honorable medical discharge. Maybe I didn't describe it right.

Q "Q Was it a medical discharge?

"A No."

Was that a truthful answer?

A I thought you meant general honorable conditions.

THE COURT: May I hear the question and answer as read by Mr. Stearns, Mr. Kaufman?

(Record read.)

THE COURT: Mr. Stearns, when you purport to read from some document, I suggest you don't read a portion of the answer.

MR. STEARNS: May I say, when I read the question

initially, I read the entire answer.

THE COURT: I suggest in the future you be very careful if you are about to put a question to the witness and you are asking him he said something, you read the entire question and the entire answer.

You may proceed.

BY MR. STEARNS:

Q Mr. Bernardini, you said there were pallets down on the deck. Were they at approximately the mid-point of the hatch?

A I couldn't say mid-point. I said approximately the middle. It could be down further.

Q Do you know whether it was down further, in the approximate middle or what?

A A little down further. Another foot or so, feet.

Q About how long was it from the aft corner on the inshore side to the forward corner on the inshore side?

A I don't know how long the hatch was.

Q Can you estimate it at all?

A I told you when I met you May 11. There are all different kinds of hatches on the ship.

Q Can you estimate how long it was from the aft corner to the forward corner?

A No. 30 feet, 40 feet.

MR. AUSLANDER: If you can't estimate, don't guess.

THE COURT: Please, Mr. Auslander. The witness can answer the question.

If the witness can answer the question, I know he will.

Q You mentioned 30 or 40 feet. Is that a fair estimate?

A Right.

Q So it might have been then a little less than 20 feet from the corner to the pallets, is that what you are saying?

A 20 feet from the corner to where the pallets were?

Q To where the pallets began, is that fair to say, about 20 feet?

A Roughly. Go ahead.

Q Who was that circle, what does that refer to?

A The gangway man. I didn't see him there before when I went on the deck.

Q How do you know he was the gangway man?

A The gangway man.

Q He was not the same guy that was on the other side?

A No, he was just pulling slack in.

MR. STEARNS: If I may have a moment, your Honor.

THE COURT: Why don't we take a five-minute recess at this time.

When the jury steps into the jury room, don't discuss the case.

We will take a five minute recess.

(Recess.)

MR. AUSLANDER: Your Honor, I ask at this time to interrupt the cross examination of the plaintiff so we can put Dr. Graubard on the stand so he can go back to his practice.

THE COURT: Is there any objection to that, Mr. Stearns and Mr. Testa?

MR. STEARNS: No.

MR. TESTA: No.

THE COURT: Ladies and gentlemen, this does happen in cases when we get professional witnesses such as Dr. Graubard and they have a busy schedule and therefore, I will interrupt the cross examination of the plaintiff at this point and permit Mr. Auslander to call Dr. Graubard out of turn.

You may proceed.

D R. D A V I D J. G R A U B A R D,

called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AUSLANDER:

Q Are you duly licensed to practice medicine in the

State of New York?

A Yes.

Q Do you have an office for that practice?

A Yes.

Q How long have you been so licensed?

A Since June 30, 1932.

Q Give the Court your medical background.

A I was graduated from the University Bellevue Medical Hospital in 1932. I interned for one year at Beth Israel, the second year at Cumberland Hospital, then went into the Army from '34 to '37 as assistant chief of the surgical service at Governor's Island, New York.

From 1937 to 1941 I was in private practice as assistant visiting surgeon at Cumberland Hospital, Broad Street Hospital and New York Post Graduate Medical School and Hospital.

From 1941 to 1946 I was in the service and since then I have been in private practice.

At the present time I am associated with the Trafalgar Hospital, New York City as an assistant visiting surgeon and I am certified as a specialist in general and traumatic surgery by the Workmen's Compensation Board of the State of New York.

Traumatic surgery deals with injuries.

Q Doctor, did we ask you to examine Mr. Bernardini and render a report to us and also to come into Court today to

testify as to your findings?

A Yes, sir.

Q When was the first time that you saw Mr. Bernardini following this incident of October 28, 1969?

A One week after he stated he got hurt on November 4, 1969.

Q Where did you examine him?

A At my office, 30 East 85 Street, New York City.

Q Did you make an examination of him?

A Yes, sir, I did.

Q What did that examination consist of?

A Well, the examination at the time that I saw him showed a definite swelling and tenderness about the right acromio clavicular joint. That is on the right shoulder area at the end of the collar bone where the collar bones joins with the scapula or shoulder blade, it is called theacromio clavicular joint and this was swollen.

When he tried to movehis arm, this was attended with crepitus or grinding sensation that you could feel by putting your hand on that joint and then there were also defects noted with respect to the motions of the shoulder such as flexion, which is bringing it up in front of you, extention, bringing it back, abduction, bringing it up away from the body and adduction, place it toward the opposite shoulder and

internal and external rotation, turning your arm in and out.

Q Would you say he had restriction of those movements?

A That is correct.

Q At that time, did you inquire of him as to what his vocation was?

A Yes.

Q What did he tell you?

A He was a longshoreman.

Q Did you come to any conclusion as to whether or not with the injury that you found, the physical findings, that he was able to at that time do the work of a longshoreman?

A I found that he was unable to do the arduous work of a longshoreman.

Q Did you recommend anything else for him?

A Yes. I said he required further treatment.

Q Did you see him again?

A Yes, sir.

Q When was that?

A June 29, 1970.

Q Where did you see him at that time?

A I saw him at my office.

Q Did you make an examination of him?

A Yes.

Q What were your findings at that time?

A I found that there were definite defects in the various motions of the shoulder as I have described before. He still had some tenderness in what is called the bicepital groove which is at the head of the arm bone at the shoulder area of the muscle and there was also tenderness noted over the acromio clavicular joint as I have described.

Q You say you still found swelling at that time?

A That is correct.

Q Did you come to a conclusion as to the type of injury?

A Yes.

Q What was that conclusion?

MR. STEARNS: May I interrupt. I am not sure from the question whether the doctor is being asked for a diagnosis or whether he is being asked for an opinion or conclusion.

THE COURT: Would you rephrase your question so it is clear.

Q Doctor, after you made your examination, did you come to an opinion as to whether or not this man had any causally related disability of the right shoulder?

MR. STEARNS: I will object to that question.

THE COURT: Sustained.

Q Doctor, after you made that examination, did you come to any medical opinion based upon reasonable medical

certainty as to whether or not there was any disability of the right shoulder?

A Yes, I did.

Q What was the opinion you reached?

MR. TESTA: Objection, if your Honor please. In the absence of any connection or any question to the doctor with respect to causal relation, I will object to any findings he made.

MR. AUSLANDER: We are talking about physical disability of the shoulder.

THE COURT: The plaintiff testified already to a certain extent and I think under the circumstances there is enough in the record now to permit this question to be asked. If you continue with your objection I will rule on it.

MR. STEARNS: I also want to make an objection at this time to any conclusion in terms of percentages. There is no basis for this and it is a question for the jury, a final question for the jury and it is improper.

THE COURT: They can accept or reject the doctor's conclusions as they see fit. This is their function.

Do we have a pending question?

MR. AUSLANDER: Yes, we do.

THE COURT: Mr. Kaufman, would you read back the pending question to the witness; to the extent it is necessary

I will overrule those objections which have been interposed and permit the doctor to answer the pending question.

(Record read.)

A That he had a causally related disability or impairment to the right shoulder.

MR. TESTA: Objection.

THE COURT: I will strike that, causally related. What did you find?

THE WITNESS: Thathe had an impairment to the shoulder equivalent to a loss of function to the arm.

Q Did you come to a medical opinion as to percentage of disability of that shoulder and arm?

A Yes.

Q What was that?

A 17 and a half percent loss of function.

Q Can you explain what that means, doctor?

MR. TESTA: Again I am going to object in the absence of any testimony with respect to causal relationship, it is improper.

MR. AUSLANDER: Let me withdraw it for a moment and give you a hypothetical.

Q Assume, if you will, there has been testimony that the plaintiff, Mr. Bernardini, had never injured his shoulder prior to this accident of October 28, 1969, and that on that

date as he walked along the deck he slipped, fell and struck his right shoulder against a metal coaming or wall; metal object, stationary object, and that following the injury he had pain in his shoulder, he was bleeding, some abrasion, he was treated, bandaged, some medication.

Assuming all that, do you have an opinion based upon reasonable medical certainty whether the injury that he sustained, the findings that you made were the approximate cause of the accident as described?

MR. TESTA: Objection.

THE COURT: Sustained.

Q Do you have an opinion, doctor, based upon reasonable medical certainty whether the injuries that you found were causally related to the accident as described?

MR. TESTA: Objection.

THE COURT: Set forth the grounds of the objection.

MR. TESTA: The doctor is now being asked with respect to examination that he conducted on June 29, 1970 and I don't know whether he is being asked about his finding on November 4 of 1969 or June 29, 1970 as that question is propounded.

Q May I ask you to take both findings of both examinations into consideration when you render your opinion.

THE COURT: Do you think you can answer the question

in its present form?

THE WITNESS: Yes.

THE COURT: You will take both of your examinations and your findings into mind when you make your response.

THE WITNESS: Considering the hypothetical question as propounded.

A Yes, it is my opinion that the accident would be a competent producing cause for the findings I noted on November 4, 1969 and my final evaluation on June 29, 1970.

Q Is it your medical opinion based upon reasonable medical certainty that this loss of function that you testified to that you found of 17 and a half percent of the right arm was causally related to the accident in question?

MR. TESTA: Objection.

THE COURT: Sustained.

Q Do you have an opinion based upon reasonable medical certainty whether the findings that you made as far as disability of the right shoulder was causally related to the accident as described?

MR. TESTA: Again I will object, your Honor.

THE COURT: Sustained.

MR. AUSLANDER: May I know what counsel's grounds are for objecting so I can cure it?

THE COURT: I think it is your province to put

another question.

MR. AUSLANDER: I don't know whether he is objecting to the form or the relevance or just what.

THE COURT: Let's take it as an objection to form.

Q Doctor, do you have an opinion based upon reasonable medical certainty in relation to thetwo examinations that you made, whether or not the disability that you say you found in the right shoulder was causally related to the accident and the injury that the man sustained on October 28, 1969?

MR. TESTA: Same objection.

THE COURT: At this time state your reasons. I am prepared to sustain the objection but for your edification, Mr. Auslander, I will require counsel to state his reasons.

MR. TESTA: I am objecting on the grounds that this doctor is being asked to state whether or not his findings were causally related to an accident of October 28, 1969 in connection with examinations he made on November 4, 1969 and June 29, 1970 without being asked -- at that point I want to stop. I don't think I have to pursue it any further.

THE COURT: Yes you do, in order to have the objection stand.

MR. TESTA: He is not being asked to take into consideration what the man's condition was in between these

periods of time. He is being asked about something, about an examination he made in 1970 as relating back to something in 1968 when he only saw him in November of 1968 and June of 1970.

THE COURT: Why don't you take the examinations one at a time, Mr. Auslander. Start with the examination he made on November 4, 1969 which is approximately a week after the accident.

Q Doctor, do you have any opinion based upon reasonable medical certainty whether the conditions that you found on your examination of November 4, 1969 were the approximate result of the accident as described of October 28, 1969?

MR. TESTA: Object to the form of that.

THE COURT: Yes. It is objectionable as to form. You will have to rephrase the question. I will wait a moment for you but you do have to rephrase it.

Sustained.

Q Doctor, do you have an opinion based upon reasonable medical certainty whether the findings you made on November 4, 1969 were causally related to the accident as described of October 28, 1969?

A I have an opinion.

Q Can you tell us what that opinion is?

A My opinion is that the accident would be the competent

producing cause for the findings that I noted and the disability he had on that particular date.

Q If you will assume further along with the rest of the hypothetical that I gave you that between that period and your second examination there was no other injury, that he received a course of treatment of heat as a medication, some therapy of some type and that he then returned to work after about six weeks and that he testified that from that period which would be sometime in December until sometime in March the following year, he lost occasional days from work when the weather changed to cold or snowy or when he was doing arduous work because of the pain in his shoulder, and that he couldn't lift or his shoulder stiffened up; assuming all of that, do you have an opinion based upon reasonable medical certainty whether the conditions you found in your examination of June 29, 1970 were the competent producing cause arising from the accident of October 28?

MR. TESTA: Objection.

THE COURT: Sustained.

Q Doctor, do you have an opinion based upon reasonable medical certainty as to whether the accident of October 28, 1969 was the competent producing cause of the conditions that you found in your examination of June 29, 1970 taking into consideration the hypothetical facts that I gave you

prior?

MR. TESTA: Same objection.

THE COURT: If you understand the question, doctor.

THE WITNESS: I do.

THE COURT: The objection is overruled.

MR. TESTA: May I just state for the record, the doctor is being asked to assume something not in evidence. He is being asked to assume there is no intervening injury to the shoulder.

THE COURT: It is in evidence. The plaintiff, if my notes are correct, testified in this respect.

My own notes indicate that he had no injuries prior to or subsequent to October 28, 1969. That is my recollection of the record. If it is not there, you are quite right, but that is my recollection.

A I have an opinion.

Q What is that opinion?

A That the accident would be a competent producing cause for the impairment of that right shoulder.

Q To the percentage of 17 and a half percent?

A Yes, sir.

THE COURT: Assuming that there was no other accident prior to the date of the examination or after the date

of the examination?

THE WITNESS: Right.

Q Assume further there was no subsequent accident up until today?

A Yes, sir.

Q This afternoon while we were in recess, did you examine the man again at my request?

MR. STEARNS: I object to this. I think it is wholly improper. There has been no report delivered of this examination. This is highly objectionable.

THE COURT: I will sustain an objection here.

I think he can give his opinion from his prior examination and under the circumstances, it would seem to me that this type --

MR. AUSLANDER: May I be heard at the side bar.

THE COURT: No. If you want to ask another question you can, but I am sustaining that objection.

They may open the door on cross examination and I will permit you to come back on redirect. It is the only comment I will make.

Q Doctor, do you have an opinion based upon reasonable medical certainty whether the disability that you found and that you testified to of this man's right shoulder is a permanent condition?

MR. TESTA: Objection.

THE COURT: Overruled.

MR. TESTA: As of today?

THE COURT: He examined him last in 1970 and if he has an opinion as to whether the injury is permanent in nature, I will permit him to give his opinion. The jury will determine the weight to be given to it.

MR. TESTA: I would like to say I object to his testimony if he is going to say as of today he has an opinion. If he says as of the last time he saw him he has an opinion --

THE COURT: I can't separate one thing from another.

MR. TESTA: That is the nature of my objection.

THE COURT: And I am not about to --

Q You may answer.

A As of June 29, 1970, it was my opinion and it still is my opinion that he has a permanent partial impairment of the right shoulder.

Q Doctor, with the injury that he received, the findings and diagnoses that you made, would that be consistent with causing this man pain upon weather change?

A Yes.

Q Would it be consistent with causing a man pain on arduous labor?

A Yes.

Q Even until today?

A Yes, sir.

Q Would it be consistent with a swelling being present in the man's shoulder even until today?

MR. TESTA: Objection, if your Honor please.

THE COURT: Sustained.

Q Doctor, assume there is swelling in the man's shoulder --

MR. STEARNS: I object to that.

THE COURT: Sustained.

MR. AUSLANDER: Thank you.

*** CROSS EXAMINATION

BY MR. STEARNS:

Q Dr. Graubard, what do you have with you today?

A Copies of my reports.

MR. STEARNS: May I have these marked for identification.

THE COURT: You may.

They will be Defendant Rederi Exhibit A for identification and the second one, B for identification.

** (Defendant Rederi Exhibits A and B marked for identification.)

Q Is that your complete file on Frank Bernardini?

A With respect to the accident of 10/28/1969, yes.

Q Has he been examined by you in connection with other accident?

A Yes.

Q How many others?

A About four or five.

Q Did each of these entail perhaps two examinations?

A Some of them, yes, sir.

Q Mr. Bernardini was sent to you on these four or five other occasions by other attorneys or by Mr. Auslander or other members of his firm, isn't that so?

A From the law firm of Israel Adler --

Q Which as you know is associated with the firm of Zimmerman & Zimmerman, attorneys in this case.

A Yes.

Q So they send Mr. Bernardini to you on a fairly regular basis?

A When he got hurt they would send him to me.

Q When he is making a claim, is that so?

A Yes, sir.

Q Do you have recollection of when you first saw Mr. Bernardini in connection with any claim of injury?

A No, sir, I don't recall because I don't have those papers with me.

Q Did you think it was important to bring them with

you?

A No, sir.

Q Do you know when you saw him last in connection with any injury?

A April of this year.

Q What was he claiming then?

A One of his legs, I forget which one.

Q Did you give an estimate of percentage disability in that case?

A I think so, yes, sir.

Q Do you remember what the estimate would have been?

A No, sir.

Q Do you remember whether or not it might have been 20 percent?

A I don't recall, sir.

Q Did you take time to check your file on that before you came to Court today?

A No, I just looked through the papers and I saw it was in April. That is all and I put it back into the file.

Q Do you have some sort of central file on plaintiffs such as Bernardini so you can tell yourself at a glance how many times they had been there, for what, and what percentage disability you gave?

A I would have to go through each particular case.

Q Do you cross index these so you would know if you have seen a man before on another matter?

A Oh, yes.

Q You didn't check these files?

A I didn't check them. I know it was not with the right shoulder.

Q Did you check for that?

A That is right.

Q Are you saying now that none of these five or four other examinations had to do with the right shoulder?

A That is correct.

Q Other parts of the body?

A Yes.

Q In each of these connections, it was in connection with an accident, each claim?

A Each one.

Q How many people do you examine a year for Israel Adler Ronca & Gucciardo or for Zimmerman & Zimmerman?

A It will vary from week to week. This week none. The last week I saw three and sometimes I will see ten in a week.

It will vary anywheres from maybe three to four hundred in a year.

Q So you see as many as ten plaintiffs a week at the

request of this law firm and its allied law firm?

A It doesn't come out to ten. I said between three and four hundred.

Q Of course you are paid for each one of these examinations?

A I am paid for my examination and my report.

Q And you are also paid when you come to Court?

A Yes.

Q So this one law firm, actually two, but as we know they are allied, sends you from three to four hundred plaintiffs a year, is that not so?

A Yes, sir.

Q That is just one of many law firms that send you plaintiffs for examination, isn't that so?

A Yes, sir.

Q Can you estimate how many other plaintiffs you might examine in a year?

MR. AUSLANDER: If your Honor please, I will object to this. I really don't know what the relevancy is nor is this proper cross examination.

MR. STEARNS: The broadest latitude is allowed in cross examination of an expert witness.

THE COURT: I thought you had made your point but I will permit you to continue briefly if you wish.

A I can't tell you. It varies.

Q Hundreds, if not thousands?

A If you consider my own cases, my own patients. It will go up into a thousand in a year.

Q Doctor, you do not have, I assume, and correct me if I am wrong, an independent recollection of seeing Mr. Bernardini on November 4, 1969?

A No, sir.

Q You have no independent recollections of what findings you might have made on that date?

A No, sir.

Q And your entire file for that examination is in your hand and it consists of one four-paragraph report, is that not so?

A Yes.

Q On direct examination did you hear you testify that on November 4, 1969, Mr. Bernardini exhibited defects in abduction, external and internal rotation of the shoulder?

A I added that but I spoke up there were movements of the shoulder and defects.

Q When you were questioned about the initial examination on November 4, 1969, did you or did you not testify there were defects in adduction and internal and external rotation?

A Yes, sir, I did do that.

Q Is there anything in your report of November 4, 1969 which would indicate that there are any, that you found at that time, any defects in adduction or internal or external rotation?

A It just states there were definite defects noted with regard to the mobility of the shoulder.

Q And you would have no way of knowing, doctor, without any independent recollection what these defects in mobility might have been, is that not so?

A The defects noted are those that I usually examine them for and which I use. I shortened this particular report without going into full detail.

Q We are talking about your ability to testify, doctor, and I am not casting any aspersions --

THE COURT: Please, let's just have questions.

Q At the time of the examination of November 4, 1969, can you say sitting here testifying that the man had defects in adduction and internal and external rotation of the shoulder?

A I would say yes.

Q Based on?

A Just on my own usual common practice.

Q In reporting or in examining?

A In examining and with the shortened report that I have.

Q You did not, you will admit in your report of November 4, 1969, make specific reference to any specific defect?

A I did not.

Q Where is the acromio clavicular joint?

A It is at the distal end of the collar bone. The collar bone as it gets up to the end of the shoulder joint, you will find a small knob-like area.

Q It is not then on the top of the shoulder.

A It is on the top. It is anterior to or forward from the exact top.

Q It is not specifically on the top of the shoulder?

A No, sir.

Q It is slightly more forward?

A That is correct, sir.

Q Doctor, do you believe when you examined Mr. Bernardini for the last time you did make an estimate of percentage loss of one of his legs?

A I think so, I am not sure, but I know I did examine him the last time was in April of '73. I don't recall the exact reason or the why's for it.

Q Do you remember the exact percentage of disability?

A No, I do not.

Q You are certain, are you not, that you did find a percentage of disability?

A I believe I found a percentage of disability.

Q Don't you customarily find a percentage of disability?

A Not always.

Q Customarily?

A It all depends.

Q On these four or five other occasions -- let's restrict it to three or four when you examined other than most recnetly and other than in connection with this suit.

On those occasions, did you also find a percentage of disability in one or more parts of Mr. Bernardini's body?

A I don't recall, I may have.

Q Again you don't always find a percentage of disability?

A No, sir.

Q But generally you do?

A It all depends what had happened to the man.

Q Again speaking of the three or four and excluding the examinations in this case and the one most recent, do you know what percentage of disabilities you might have found on these other three or four occasions?

A No, sir.

MR. AUSLANDER: I will object to that. There is no relevancy unless we are talking about the shoulder.

THE COURT: The witness answered in the negative.

MR. AUSLANDER: He keeps repeating the same question.

THE COURT: You can make your objections a little more promptly or the witness when he sees you rising can wiat with his answers and we can dispose of the matter more quickly.

He already answered no and it seems to me we should get on with the next point.

Q With the percentage of disability that you believe you found in 1973 at the time of your more recent examination, would that affect in your opinion, Mr. Bernardini's ability to work?

A You mean the examination I did in April?

Q Right, for one leg or the other?

A No. I thought he could return to work with the disability.

Q Did you find that this man had a permanent injury to one leg or another?

A I believe so, but I can't recall exactly which one and when and for how much percentage.

Q Is it your opinion, doctor, that this plaintiff, Mr. Bernardini, will lose time on an intermittent basis as a

result of the injury to this one leg or another that you observed in 1973?

A I don't recall, sir.

Q Do you know whether or not when that case is called for trial if it soon is, you will testify?

MR. AUSLANDER: Objection. There is no testimony that the man has even made a claim.

THE COURT: Sustained.

Q You remember nothing in particular of the other examination?

A No, sir.

MR. STEARNS: No further questions.

*** CROSS EXAMINATION

BY MR. TESTA:

Q Dr. Graubard, did I understand you to say that you examined a thousand patients a year?

A Yes, sir.

Q Are these men that are sent to you by the firm of Zimmerman & Zimmerman?

A No, I did not say that. I said between three and four hundred from that firm of Israel Adler Ronca & Gucciardo.

Q All told from plaintiff's lawyers, you see over a thousand, is that right?

MR. AUSLANDER: I will object to that unless counsel

designates who are plaintiff's lawyers.

THE COURT: Perhaps you can rephrase your question. I will sustain the objection as to form.

Q When I say plaintiff's lawyers, lawyers who represent men in lawsuits, doctor, have you seen a thousand men a year under those circumstances?

A You want to include compensation cases, yes.

Q You have been practicing medicine since 1932, during that period of time, how many men have you examined that were involved in lawsuits?

A About 35,000.

Q And you examine them for the purpose of testifying in Court, did you not, doctor?

A If called upon, yes, sir.

Q Did you testify in that number of cases over the last 35 or 40 years?

A No, sir.

Q When you examine these men, you examine them for the express purpose of finding a percentage disability?

MR. AUSLANDER: Objection.

THE COURT: Sustained.

Q What is the purpose of your examination, doctor?

A To render an opinion.

Q Is it to render an opinion with respect to a percentage

disability?

A Or as to causal relationship or as to whether or not there is any disability at all.

Q But to answer the first part of my question, you examine them for the purpose of finding an express percentage disability or not?

MR. AUSLANDER: That is objected to because the doctor already answered that specifically that there are three reasons or more that he would examine the man.

MR. TESTA: I am only dealing with the first one.

THE COURT: Overruled.

A Specifically to find a percentage, no, sir.

Q Do you examine them to find out whether or not they have a percentage disability?

A No, sir.

Q How many times would you say in the 35,000 cases you found a percentage disability?

A I would say less than half.

Q Less than half, less than 17,000?

A That is right.

Q You would have found percentage disability in 17,000 cases, is that right?

A Yes, sir.

Q In this particular case you found a 17 and a half percent disability?

A Yes.

Q How did you arrive at that figure?

A Based on my experience over the last 40 years of the evaluation of a loss of function.

Q How many times have you found a 17 and a half percent percentage disability?

A I don't know, I can't tell you.

Q Would you say thousands of times?

A No.

Q Would you say hundreds of times?

A Yes, sir.

Q As a matter of fact you testified in a case in which I was involved in only about two weeks ago?

A Yes, sir.

Q In this very court house?

A Yes.

Q Up on the 28th floor, right?

A I don't remember the floor.

Q It was in this court house?

A Yes.

Q And you found a 17 and a half percent disability in that case, didn't you?

A I don't recall.

Q Do you recall being examined by a lawyer named Kimbal who put his hand in front of you during the course of cross examination and asked you if there was a percentage disability in his hand, do you recall that?

MR. AUSLANDER: I will object to this, your Honor, I don't see the relevancy of that question or whether it has anything to do with this particular lawsuit or cross examination of the doctor.

THE COURT: It is cross examination. I fail to see at the moment, but it is cross examination and I think I have to allow it. At least I intend to allow it. Overruled.

Q Do you recall that incident?

A He gave me his left hand. He asked me to look at it.

Q And you looked at it?

A I looked at it but I didn't fully examine it.

Q But you told him he had a 17 and a half disability, didn't you?

MR. AUSLANDER: That is objected to.

THE COURT: Overruled.

A I did not say that. If my memory serves me correctly, I did say assuming there was this fracture in his hand involving either the fourth or fifth metacarpal bone --

Q Dr. Graubard --

THE COURT: Let the witness finish.

A I said at that time there would be a minimal of 17 and a half percent loss of function of the hand. That is based upon a very cursory inspection and palpation in which he withdrew his hand.

Q That was the plaintiff inthat case?

A Mr. Kimble was the attorney for the defendant.

Q But you didn't know that he had any injury to his hand, did you?

A Until he pointed it out to me.

Q He asked you to look at his hand?

A That is right. He asked me to look at the scar.

Q After you looked at it, you told him he had a 17 and a half percent disability?

A I did not say that. As I told you, to the best of my recollection I said it would be a minimal, minimum 17 and a half, probably more, but then he withdrew his hand, he wouldn't let me examine him anymore.

Q And that was on the basis of just looking at his hand in front of you for a few seconds?

A It shows you how obvious the defect was in his hand that it only took an experienced doctor five to six seconds to know that he had a defect.

Q 17 and a half percent or more?

A Or more.

Q When you examined Mr. Bernardini on November 4, 1969, how long did you take to examine him on that occasion?

A 15 or 20 minutes.

Q During that 15 or 20 minute-period of time, did you take any X-rays?

A No, sir.

Q Did you make any tests of any kind?

A Movements of the shoulder, my inspection, my feeling of the shoulder.

Q Did you ask him to take his shirt off?

A Definitely, that is where he had the trouble.

Q Is it in the report?

A No.

Q Does the report say you asked him to disrobe?

A I always ask them to disrobe.

Q Your report doesn't say that, does it?

A No, sir.

Q In your report of November 4, 1969, all you said was there were definite defects noted. You didn't say he had any difficulty with flexion or extension or abduction or anything else?

A No, sir.

Q In that same report, your conclusion was he had a causally related disability.

Did anybody ask you to give a report as to whether it was causally related or not?

A I usually do that based upon the history.

Q You didn't even take any history in this case, did you?

A I did.

Q And you report back a causal relationship, is that it?

A Due to the injury.

Q You do that in every case?

A If there is a history of an accident and I determine that that is related, I will so report it.

Q When this man came to you, did he come to you with a letter from Zimmerman & Zimmerman or Israel Adler Ronca & Gucciardo?

A He came from a telephone call.

Q Did he come with any typewritten statement of what the history was, how the accident happened?

A No, just a telephone call.

Q When they called you on the telephone, did they say they wanted an opinion as to whether it was a causally related disability?

A They wanted to know whether he was capable of returning to do the arduous work.

Q Did they ask you whether in your opinion it was causally related to an accident?

A No, sir.

Q But you made that finding anyway even though nobody asked you?

A That is correct.

Q You always make that finding, is that right?

A Depending upon the history, yes, sir.

Q You said in that report of November 4, 1969 that he still requires further treatment?

A Yes.

Q Did you give him any treatment?

A No, sir.

Q Did you recommend any treatment?

A I said he still requires further treatment.

Q I realize that. Did you recommend any particular type of treatment?

A No, sir.

Q So you didn't examine this man forthe purpose of helping him in any way, just to give a report, is that right?

A I examined him at the request of his attorneys for an opinion. From that particular point on, he was taken

care of by others.

Q And you knew when you gave that opinion that someday you would be called into a courtroom like this to testify?

A No, sir.

Q Did you get paid for that report?

A Yes, sir.

Q How much?

A $20.

Q Are you being paid for coming here today?

A For my time, yes, sir.

Q How much?

A It depends when I get out of here.

Q How much are you paid for your time per hour?

A A hundred dollars an hour.

Q When did you leave your office?

A I left my office at a quarter of three.

Q Where is your office?

A 38 East 85th Street.

Q And you got here before 3:00, didn't you?

A No, I think I got here -- I parked my car at 3:11 on Worth Street in the garage. Then I walked over here.

Q Do you keep records like that in connection with themen that you see?

A What records?

Q Exact time.

A You asked me so I told you.

MR. AUSLANDER: I will object to this. Counsel is just being sarcastic.

THE COURT: The exchange which is obviously not necessary to the case has resulted in a question being asked and an answer being given. I think we would do well to get on.

Q The next time you saw him was June 29, 1970?

A Yes, sir.

Q Did you get a telephone call at that time?

A No, sir.

Q Did you get a letter?

A Yes, sir.

Q Do you have the letter with you?

A No, sir.

Q What did you do with it?

A I don't need it. I threw it away. After I finish it I throw it away.

Q Do you remember what it said?

A It just told me to reexamine the man, as vaguely as I remember it; that he was examined by another doctor. They sent me a copy of his report. They told me he lost six weeks from work and I should please examine him to see if

there were any permanent disability.

Q Did you examine any other doctors' reports in connection with your examinations of Mr. Bernardini?

A One other doctor.

Q Who was that?

A Dr. Magliotds report.

Q Did you know he was examined by Dr. Tagliagambe?

A I think he was the attending physician.

Q He was the treating physician?

A Yes, sir.

Q Did you see Dr. Tagliagambe's report?

A No, sir.

Q Didn't you think it was necessary?

A No, sir.

Q Did you know for what period of time Dr. Tagliagambe treated him?

A No, sir.

Q Did you think that was necessary?

A I figured if the man was out for six weeks, he was probably treated for approximately the same time.

Q Do you know that Dr. Tagliagambe told him he could go back to work on November 3, 1969?

A Yes, sir, I do know that. That is why he came to me on November 4.

Q Did you know this accident happened on October 28, 1969?

A Yes.

Q And you say that is why he came to you on November 4?

A Because his attorney needed the report from me as to whether he is still disabled.

Q And the attorney that sent him to you was who?

A Who sent him to me?

Q Yes.

A Mr. Adler.

Q And you furnished him with a report, didn't you?

A Yes, sir.

Q Was that the report of November 4, 1969?

A Yes, sir.

Q Did you see him at all between November 4, 1969 and June 29, 1970?

A To the best of my knowledge, I don't think so.

Q On cross examination by Mr. Stearns, you said you examined him four or five times for other accidents?

A Yes, sir.

Q Do you remember the dates of thoseaccidents?

A No, sir.

Q Is that before or after October, 1968?

A I don't recall. I know that I examined him after 1969.

Q Was it after October 28, 1969?

A Yes, sir.

Q All five of them?

A I don't recall, sir.

Q Do you recall what the nature of the injuries were?

A I think it was with the lower extremities. I couldn't be specific about it. If I knew I was going to be cross examined, I would have brought the reports along.

Q You have been in court thousands of times?

A Thousands, not thousands.

Q How many times have you been in court and testified in cases like this, doctor, in the last 35 years?

A You mean for your firm?

Q You never testified for my firm. For plaintiff's attorneys.

A I have testified for Jarca Corporation many times.

Q Doctor, please.

MR. TESTA: If your Honor please, I don't know what he is talking about or who Jarca Corporation is or anything else and I will object to the doctor making speeches at this point.

THE COURT: Let's get on with it. The jury will disregard the last answer.

Q How many times have you testified for plaintiff's attorneys in lawsuits?

A I don't keep statistics, I don't know.

Q You know when you come to court you are going to be cross examined, don't you?

A Yes.

Q Nevertheless you didn't bring any records concerning all these four or five other accidents that Mr. Bernardini was involved in?

A No, sir.

Q Were they all leg injuries?

A I don't recall, sir.

Q Were any of them arm injuries?

A I don't think so, sir.

Q How about the right shoulder, did any of them bother his right shoulder?

A Just this one, the 1969 accident.

Q I mean of the four or five that you examined him for after that?

A No, they did not involve the right upper extremity.

Q You are sure of that?

A I can't be sure, I haven't got the papers in front

of me, so I can't be sure but to the best of my recollection, no.

Q You testified that you don't always find percentage disability?

A That is correct.

Q But in every instance when you examine Mr. Bernardini, did you find a percentage disability?

A I don't recall.

MR. TESTA: No other questions.

THE COURT: Any redirect?

MR. AUSLANDER: Yes.

REDIRECT EXAMINATION

BY MR. AUSLANDER:

Q Doctor, when you came to court, you knew you were going to be testifying aboutyour examination of this man's right shoulder?

A That is correct.

Q Was it necessary for you to consider bringing any medical records concerning his feet or toes or ears or anything else if we are talking about a right shoulder?

A No.

Q Was it necessary to have those records to give an opinion as to what you may have found or not found concerning his right shoulder?

A No, I didn't need those.

Q Doctor, have you ever examined patients at the request of attorneys representing defendants?

A Oh, yes.

Q So your practice isn't just to examine patients for attorneys representing plaintiffs, is it?

A No, it is not.

Q Have you ever testified in court on behalf of attorneys representing defendants?

A Oh, yes.

Q Doctor, in response to Mr. Testa's question, he asked you whether you had seen Dr. Tagliagambe's reports?

A Yes, he asked me that.

Q And you had not?

A No, sir.

Q He asked you if you had seen some other doctor's report?

A Yes, sir.

Q And that was Dr. Maglioto?

A Yes.

Q Who was Dr. Maglioto?

MR. TESTA: Objection.

MR. AUSLANDER: Mr. Testa opened the door.

MR. TESTA: I didn't open the door as to any other

doctor whose report --

THE COURT: You introduced the name of Dr. Maglioto.

MR. TESTA: I only said Dr. Tagliagambe. This is the only name I introduced who was the treating physician.

THE COURT: You say at no time during your cross examination, sir, you either caused or referred yourself to this Dr. Maglioto.

MR. TESTA: That is right. I never mentioned that name and I would invite your Honor to have the record read back if there is any mention by me.

THE COURT: I heard that name mentioned, that I will tell you.

MR. TESTA: Not by me.

THE COURT: It was during the examination which you conducted, sir, and I will take you up on that last comment.

Mr. Kaufman, would you check Mr. Testa's cross examination and if you come up with the name Maglioto, would you let me know and the jury will stand by for a moment while we check this.

MR. AUSLANDER: It was within the last 30 questions of the doctor.

(Pause.)

MR. TESTA: If your Honor please, I didn't mention it. The doctor mentioned it.

THE COURT: You elicited the information, sir, on your cross examination.

MR. TESTA: Yes, but I thought your Honor's question to me was whether I mentioned any other doctor's name; I did not.

THE COURT: I think or caused it to be mentioned was part of my querie.

In any event now that we have the record straight, do you object to the question?

MR. TESTA: Yes.

MR. STEARNS: I object also, your Honor.

THE COURT: Let me hear the question.

(Question read back.)

THE COURT: In view of Mr. Stearn's objection, I am going to sustain the objection.

MR. AUSLANDER: Your Honor, that information should still be allowed to come in if only against Mr. Testa. He opened the door. Both defendants in this case. They are both defendants in this case.

THE COURT: I can't say he opened the door as to Mr. Stearns and under the circumstances --

MR. AUSLANDER: They can work as a team. One can say something, the other one will object and I can't get back any redirect to explain something or bring something before

the jury.

THE COURT: You want to bring it before the jury?

MR. AUSLANDER: Yes, sir.

THE COURT: I will give certain instructions in this regard.

Nothing that relates to Dr. Maglioto is to be taken in any way shape or form against the defendant Rederi. The jury is to completely erase from their mind anything relating to this doctor as far as its consideration in the case against Rederi.

Do you understand that ladies and gentlemen?

MR. STEARNS: In view of the fact the plaintiff is suing only Rederi, I would renew my objection.

THE COURT: We have a series of claims and counterclaims and under the circumstances since counsel is pressing this point, I am going to rule, I have given these very strong cautionary instructions. This testimony will not in any way relate to you or relate to your client since you did not elicit the information as to which an inquiry is being made.

MR. STEARNS: With all respect, I object.

MR. TESTA: And I would like to join in that objection, since the plaintiff is only suing the ship owner, there is no possible reason for allowing such testimony.

THE COURT: Inasmuch as there is a claim over, I think there is enough to permit this inquiry and you, sir, are the one who raised this point.

MR. TESTA: That is true, but the plaintiff is only suing the defendant, your Honor, and I am objecting to it on that ground.

THE COURT: I think plaintiff's counsel is taking a course which probably is not advisable, but I will permit him to ask the question if he presses the point. I think he is ill-advised to do so.

MR. AUSLANDER: I object to the Court making comments like that to the jury as to whether I am advised or ill-advised to do.

THE COURT: You may proceed, sir.

MR. STEARNS: For the record may I note I consider this question prejudicial and for that reason in addition to any other that is mentioned, I object.

MR. TESTA: I would join in that objection.

MR. AUSLANDER: If it please the Court, in the pleadings there is a specific counterclaim against this plaintiff by the third party defendant. When he says I am not suing him and he counterclaims directly against me --

MR. TESTA: Objection.

THE COURT: I have mentioned this a few moments ago.

We will have no further colloquy. If you wish to ask a question you may do so.

MR. TESTA: At this point I will ask your Honor to direct the jury to disregard that comment or move for a mistrial.

THE COURT: Which comment?

MR. TESTA: The last counsel about pleadings.

THE COURT: Ladies and gentlemen --

MR. AUSLANDER: If your Honor please --

THE COURT: Ladies and gentlemen, all colloquy, all discussion is to be put aside by you. Ladies and gentlemen, in your determination of the facts, you are to look to the testimony of th ew.tnesses, you are to look to whatever exhibits may be offered into evidence, nothing else. Relative to the law, I will at the conclusion of the case and from time to time during the course of the case, give my instructions.

Proceed, please.

BY MR. AUSLANDER:

Q Who is Dr. Maglioto?

MR. TESTA: Objection.

THE COURT: Overruled.

A He is an impartial orthopedic specialist for the United States Department of Labor.

MR. TESTA: I will object to the use of the term "impartial".

MR. STEARNS: I join in that objection.

THE COURT: Strike the word "impartial." The jury will disregard that word.

Q Doctor, do you know of your own knowledge what Dr. Maglioto's function is with the United States Department of Labor?

MR. TESTA: Objection.

THE COURT: Overruled.

A He is an orthopedic consultant who is required to indicate to the department whether or not a man is injured, capable of returning to work or he has a permanent disability.

Q To your knowledge, did Dr. Maglioto examine Mr. Bernardini after you examined him?

A After my examination of November 4, he did examine him.

MR. STEARNS: May I object to that.

THE COURT: Do you know that for a fact?

THE WITNESS: Based upon the copy of the report that was submitted to me, yes, sir.

THE COURT: You will disregard the last answer of the witness. The jury will strike it from their minds.

MR. AUSLANDER: If your Honor please, I have subpoenaed the United States Department of Labor records and I offer that into evidence.

MR. STEARNS: Objection.

THE COURT: It is objected to?

MR. TESTA: Yes.

THE COURT: Sustained.

Q Did you read Dr. Maglioto's report?

MR. TESTA: Objection.

THE COURT: Just answer yes or no.

A A copy, yes, sir.

Q Was it in any way inconsistent with your findings?

MR. TESTA: Objection.

THE COURT: Sustained.

Q To your own knowledge, do you know whether or not Mr. Bernardini was directed back to Dr. Tagliagambe for more treatment after Dr. Maglioto made his examination for the Department of Labor?

THE COURT: If you know of your own knowledge.

MR. STEARNS: I object.

A No, sir.

MR. TESTA: I ask your Honor to disregard the import of the question.

THE COURT: Of course. Questions are not evidence,

ladies and gentlemen of the jury. The evidence is not what counsel for any of the parties say. The evidence is the testimony which comes from the witness on the stand or from the depositions which are read to you or from documents which are admitted into evidence.

Q Doctor, isn't it normal after doctors examine patients to render reports to attorneys?

MR. STEARNS: Objection to form.

THE COURT: Yes, sustained as to form.

Q Doctor, is it the customary practice in New York when a doctor examines a patient on behalf of an attorney, he will render a report to the attorney?

A Yes, it is usual and customary.

Q Doctor, was it necessary in your report to make a note that you had the man disrobe?

MR. TESTA: Objection as to what was necessary.

THE COURT: I think that is a question for the jury.

MR. AUSLANDER: Mr. Testa asked him that or Mr. Stearns, whether he made a note that the man disrobed.

THE COURT: Yes, and the mental operation or the conclusion as to whether it was necessary, I don't think that properly could or should be brought out in the fashion that you intend to bring it out, so to the extent an objection

is pending, objection sustained.

Q Doctor, is it necessary for the rendition of the report, for the findings that you made and the rendering of those finding to state that you had the man disrobe?

MR. TESTA: Objection.

THE COURT: Overruled.

A No.

Q Doctor, in your 1969 report, Mr. Testa asked you and Mr. Stearns asked you whether you had mentioned the types of defect you found in the shoulder and you stated, I believe, that you hadn't specifically listed them but they were covered by your statement --

MR. STEARNS: I will object right now to the form of this question.

THE COURT: He hadn't finished it.

MR. STEARNS: He has poisoned the form.

MR. ROSLANDER: I will withdraw it.

Q In response to Mr. Testa and Mr. Stearns' questions concerning your November 4, 1969 report, did you make mention of the various types of defects that you found in the man's shoulder?

A No.

Q Did you, however, in your June of 1970 report specifically state the types of defects that you found in the

man's shoulder?

A Yes, sir.

Q What were those defects?

A In the movements of flexion, extension, abduction, adduction, internal and external rotation.

Q Were these the same defects that you specifically enumerated in the June,1970 report, the defects that you found in the November, 1969 report?

A Yes, sir.

Q Doctor, what do you charge for a normal office visit for a patient coming to your office on a Tuesday afternoon for an examination?

A First visit will go anywheres between 25, 35 or 50 dollars depending upon the amount of time that I have to spend.

Q Can you approximately see four patients in an hour?

A Yes.

Q So that by charging one hundred dollars an hour to come here, you would be losing four patients?

A That is right.

MR. AUSLANDER: That is all. Thank you.

*** RECROSS EXAMINATION

BY MR. STEARNS:

Q Is it your testimony that you simply failed to

enumerate the defects that you found in the shoulder?

A I didn't think it was necessary to indicate all the defects listed specifically. I just indicated in a group manner, so to say, that there was a loss with the mobility of the shoulder, without being specific.

Q How do you know since your only contact with this examination is that one page four paragraph report, how do you know now that the defects that you found or say you found later were present on November 4, 1969?

A I am pretty positive of it.

Q You are not sure?

A I am pretty positive that that was it. He had a very sore, tender shoulder.

MR. STEARNS: Can I have that stricken?

MR. AUSLANDER: It is responsive to the question.

THE COURT: I think it is responsive to the question except for the part "He had a very sore, tender shoulder." As to that part, I will strike it.

MR. AUSLANDER: If that is what triggers his memory, that is responsive.

THE COURT: Let's hear the question.

(Question read back.)

THE COURT: I will let it stand. The last part of the answer will stand along with the rest of it.

Q Doctor, if I understood your testimony, you testified that over the years you have seen thousands and thousands of plaintiffs, is that so?

MR. AUSLANDER: Objected to. It is patients.

THE COURT: Yes.

Q You also testified of these patients, half the time, these examinations resulted in a finding by you --

MR. AUSLANDER: Mr. Stearns is paraphrasing answers and questions which are not at all given by the witness.

MR. STEARNS: I thought the doctor was nodding his head yes.

THE COURT: Let's let the doctor answer the question.

A I stated that in about half of them I found no evidence of any disability.

Q You examined this man twice?

A For this accident?

Q Yes.

A Yes.

Q And you found a percentage disability after the second examination?

A That is correct.

MR. STEARNS: No further questions.

*** RECROSS EXAMINATION

BY MR. TESTA:

Q You didn't find any percentage disability after the first examination?

A One never finds a percentage evaluation immediately after an accident. You have to wait for a period of recovery before you can evaluate as to the permanency of anything. You can sprain your ankle today and be hobbling around for two weeks and make an uneventful recovery by the end of four weeks and have no disability.

Q That is what happened in this case, isn't it?

A No, sir.

MR. TESTA: No other questions.

REDIRECT EXAMINATION

BY MR. AUSLANDER:

Q These numbers are confusing me and maybe confusing the jurors.

THE COURT: No speeches.

Q Of these thousands of people you examined, were all of these people involved in lawsuits?

A No.

Q So there were some who were inovlved in lawsuits and some come to you strictly as a treating doctor, is that not so?

A That is correct.

Q And you are asked on some occasions by attorneys

representing plaintiffs or attorneys representing defendants to examine the man and render a report, is that not so?

MR. TESTA: Objection to the leading questions on redirect examination.

THE COURT: Sustained as to form.

Q Doctor, is it a fact that on some of these people you have examined, some were recommended to you by plaintiffs' lawyers and some by defendants' lawyers for you to render an opinion?

A Yes.

MR. TESTA: Objection. This is leading and improper.

THE COURT: This was his prior testimony as I recall it. It is the jury's recollection which governs, of course, and he just answered it yes again.

Q Out of these thousands of people that you have seen and treated over the years, would you estimate that the greater percentage are private patients?

MR. TESTA: Objection.

THE COURT: Sustained.

Q Doctor, what is the percentage in your estimation of these people that are private patients that come to you for treatment and not sent to you for an examination and a report?

MR. TESTA: Objection. The doctor has already

testified that half of them he gives percentage disability.

MR. AUSLANDER: He did not say that. That is what I am arguing about.

THE COURT: If the doctor can answer the question I will permit him to do so.

A It is a very difficult question to answer for the simple reason that if I have a private patient, he is coming in to me to treat him but he also requires a report for disability insurance or a life insurance policy or to fill out a Blue Cross form, so I have to fill out a form whether I like it or not, even if it is with Medicare I have to fill out a form.

Q Is that the answer --

MR. STEARNS: Object to the form of the question.

THE COURT: He hasn't finished his question but I am prepared to rule.

Q Doctor, when you gave us the answer that you might find a disability percentage on half or whatever percentage of some of these patients, were you referring to reports that you might give to Medicare, Medicaid --

THE COURT: Sustained.

Q Were all the reports and percentage disabilities that you gave only for litigation purposes?

A No.

Q Were they for other purposes?

A Yes.

Q What are those other purposes?

MR. TESTA: Objection.

THE COURT: Sustained.

MR. AUSLANDER: All right, I think the jury understands.

THE COURT: Please.

MR. STEARNS: I object to that comment.

THE COURT: Yes. There should be no comment made.

MR. AUSLANDER: I withdraw.

THE COURT: It is closed.

MR. TESTA: No further questions.

THE COURT: You may step down, you are excused, doctor.

(Witness excused.)

THE COURT: I note it is a quarter of five. We will adjourn at this point.

Please, ladies and gentlemen of hte jury, remember these various things I have been telling you throughout the course of the case. We are still in the plaintiff's case.

I ask that you not discuss the case with anyone or remain within the hearing of anyone discussing the case;

that you keep an open mind and not decide any issue in this case until the case is submitted to you for your deliberations under the instructions of the Court and remember, as I have said on at least one occasion already, that the colloquy of counsel is not evidence.

The rulings of the Court are not evidence. The evidence is what comes from the witness stand in depositions and on exhibits.

You will return to your respective homes tonight and keep an open mind on the case, don't discuss it and you will return tomorrow morning. I note on my own schedule I have a matter on at 9:30 which should take approximately 15 minutes and another matter at 9:45 in both different cases than this which should take approximately 15 minutes.

I will ask the jury to be here ready to go tomorrow at 10:00 a.m. It is possible that my prediction of 15 minutes apiece for the two matters might be a trifle on the short side but it won't be more than a few minutes, so if you are here in your jury room ready to go at 10:00 a.m. tomorrow morning, we will resume the trial at that time.

Good night, ladies and gentlemen.

(Court adjourns to October 17, 1973 at 10:00 a.m.)

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FRANK BERNARDINI
vs.
REDERI A/B SATURNUS
vs.
INTERNATIONAL TERMINAL OPERATING COMPANY, INC.

New York, October 17, 1973,
10:00 a.m.

Trial resumed.

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(In open court; jury present.)

THE COURT: Good morning, ladies and gentlemen of the jury. I have taken some of the matters that I have spoken to you about yesterday. There is another matter which I will take when we have our midmorning recess.

We will continue through the morning with a midmorning recess at about 11:30.

Mr. Auslander, you may proceed.

MR. AUSLANDER: Your Honor, I believe that the plaintiff was on the stand on cross.

THE COURT: Yes, he was.

Mr. Bernardini, would you resume the stand and you will continue the cross examination which had begun

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yesterday by Mr. Stearns.

F R A N K B E R N A R D I N I resumed.

CROSS EXAMINATION CONTINUED

BY MR. STEARNS :

Q Mr. Bernardini, I think when we left off yesterday I was asking you about your position at point Y, which you will remember is where you said you were after having turned this corner, the after inshore corner of he the hatch and when you heard the crackling of the boom or one of the wires in the boom.

Did you testify that you were about two feet from the corner at that time?

A I don't recollect.

Q How many feet were you from the corner when you heard the crackling?

A I didn't take notice of how many feet.

Q You can't say?

A I can't say.

Q When you heard the crackle, you stopped?

A Yes.

Q I believe that is what you testified to yesterday.

A Yes.

Q And you looked over and assured yourself that

everything was all right?

A Yes.

Q Then you began walking forward on the inshore side, isn't that so?

A Yes.

Q When did you first see the grease?

A As soon as I heard the crackle of the noise I looked down, walked a few steps, then I saw some grease spots. I tried to dodge them and I slipped.

Q Tell me if you can answer this directly, if you can, considering yourself at point Y, after you looked and started again. When did you see the grease spots?

MR. AUSLANDER: If your Honor please, the witness just answered he walked a few steps, he looked down and saw the grease spots.

THE COURT: Let's let him try to answer it again if he can. I think it was covered yesterday as well, but I will permit it. It's a fresh day. If the witness can answer the question he may do so.

A I couldn't tell you how many feet but all I can tell you is I heard the noise, I looked up. I walked a few steps, a few feet. When I looked down again I saw the spots and I tried to dodge them and I slipped.

Q How many steps did you take walking from point

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Y toward the pallets dodging the grease?

A I couldn't tell you.

Q As many as five?

A I couldn't tell you.

Q Were you taking tippytoe steps?

MR. TESTA: Objection to the continuous use of the expression "tippytoe steps." Nobody has said that in this case.

MR. STEARNS: I will withdraw it.

Q Did you use that expression at your deposition?

A Yes.

Q In any event, walking along these spots you tried to dodge them and stepped in one?

A I saw them too late.

Q You saw these grease spots and you tried to dodge them, is that right?

A I saw them too late. I tried to dodge them. My mind was on the boom.

Q Were you watching where you were going?

A Yes.

Q You saw the grease?

A It was too late.

Q You saw it before you slipped?

MR. TESTA: Objection.

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MR. AUSLANDER: I object also.

MR. TESTA: The witness testified three times he saw it too late.

THE COURT: Sustained.

MR. STEARNS: He also testified --

MR. AUSLANDER: I object to counsel's characterization.

THE COURT: The objection is sustained. Ask your next question.

Q When you slipped which foot slipped?

A My left foot slipped.

Q How far were you from the pallets when your left foot slipped?

A Not too far.

Q Can you estimate in feet?

A I couldn't remember.

Q Could it have been 10 feet away from the pallet when you slipped?

A No.

Q You can't estimate in feet?

A No.

Q When you slipped which direction did you fall, if you did fall?

A I slipped on the grease and I twisted -- I

went over the pallet and tripped and twisted my body.

Q You slipped on the grease. Did your body then twist?

A Twist. When you slip --

THE COURT: Would you try to answer the question?

A I slipped. I tried to get my balance and I tripped.

MR. STEARNS: Could I have the question read back.

THE COURT: You may.

(Question read.)

Q Can you answer that question?

A I slipped on the grease. I was trying to hold my balance and I tripped and fell on the pallet and hit my left shoulder on the coaming.

Q Can you answer the question,when you slipped which way did your body twist?

A To the left.

Q Is that before or after you tripped?

MR. TESTA: Objection. The witness has testified he did not trip.

THE COURT: I have in my notes, and the jury's recollection, of course, will govern, that he said

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he slipped on the grease. I have heard that twice. I think I am correct.

MR. STEARNS: I think, your Honor, with the same acknowledgement of weakness of my recollection, he also said he tripped.

THE COURT: Let's ask him.

Q Did you also trip?

A I slipped first.

Q You slipped, then you tripped.

A The pallets were right there.

MR. TESTA: Objection.

THE COURT: Please, Mr. Testa, let's finish. You slipped first; then what happened?

THE WITNESS: As I was going down, the pallets were there and I fell on the pallets.

BY MR. STEARNS:

Q Did you trip on the pallets?

MR. TESTA: Objection. That is the third time the witness said he slipped and fell --

THE COURT: Did you trip on the pallet?

THE WITNESS: I fell on the pallet. When you have an objection like that --

MR. TESTA: I object to any further use of the word "trip."

MR. AUSLANDER: As a matter of fact, he said he fell over the pallets.

THE COURT: I just noted what he said and the jury did too. I don't think we need any help from any of the counsel.

Q You did not trip?

A I tripped over the pallet -- when I slipped on the grease the pallets were in front of me.

Q So what?

A So you could trip on the pallets too.

Q Did you trip on the pallets?

A I fell on the pallets. I tripped on the pallets.

Q Did you trip on the pallet?

A Yes.

MR. TESTA: Objection --

MR. STEARNS: He just said --

THE COURT: Gentlemen, let me try to clarify this.

Mr. Bernardini, did your feet, or either of them, come into contact with the pallets?

THE WITNESS: After I slipped.

Q Your feet came in contact with the pallets?

A I tried to get my balance and I tripped on

the pallet.

Q That is your testimony?

MR. AUSLANDER: I object to the question.

THE COURT: Yes, of course.

You withdraw it?

MR. STEARNS: Yes, your Honor.

Q You injured, did you not, Mr. Bernardini, the top part of your right shoulder?

A Yes.

Q The top part of your right shoulder.

Again asking you to consider this table as the hatch coaming, this being the after inshore corner, walking along, the pallets are over here in front of you, you slipped, you tripped, you twist and you manage to strike the top of your right shoulder against this coaming, is that what you are saying?

A I don't know how it happened, but I hit the coaming with my right shoulder.

Q That is how it happened: slipped, tripped, twist and your right shoulder, the top part strikes this coaming?

A My right shoulder.

Q The top of your shoulder?

A My rightshoulder.

Q That is the only part of your body hurt in this accident, is that correct?

MR. AUSLANDER: Your Honor, he didn't say the top of his right shoulder. He said the right shoulder. Mr. Stearns is consistently putting top, top top.

THE COURT: He testified, according to my notes -- and again it is the jury's recollection which governs -- that as he went down he felt pain, as I have it in my notes, on the top of his right shoulder. It may be that my notes are inaccurate.

Can you tell us what portion of your right shoulder struck what object?

THE WITNESS: My whole shoulder was swollen so I figure the top of my shoulder. The whole shoulder was swollen.

THE COURT: You have placed your hand on the top of your shoulder.

THE WITNESS: When I hit the coaming it was all bruised up, scratched.

THE COURT: Are you certain whether the top of your shoulder hit something?

THE WITNESS: It hit the side of the ship.

THE COURT: What, the coaming?

THE WITNESS: The coaming.

MR. STEARNS: May I read from the deposition? Page 45, line 13. I would ask Mr. Testa and Mr. Auslander to stipulate that I am talking about an examination by Dr. Tagliagambi after this alleged accicent.

"Q And he took x-rays. After you had taken your shirt off did he look at your shoulder?

"A Yes. It was all bruised up.

"Q Where?

"A On the top.

"Q Across the shoulder on the top, right?

"A Yes."

THE WITNESS: That is the shoulder, across the top.

Q "Q When you fell you banged the top of your shoulder, right?

"A Right, the top side."

Mr. Bernardini, that is your testimony?

The first question I asked you, you told me on top of my shoulder.

Do you remember being asked those questions and giving those answers?

A Yes.

Q Were your answers true?

A Yes.

Q Who was on deck, on the deck near the No. 4 hatch, when you claim you had an accident?

A A mate over here. I surmise it was the mate. He was standing on the other side of the pallet on the inshore side when I fell.

Q He was the only one, is that correct?

A There was a guy, a man over there, but I think it was up further.

Q What are you referring to?

A The gangway man.

Q Where was he?

A I can't remember. I know it was on this side of the pallet. I don't know whether it was down near the hatch, next to the coaming, or over there.

Q Are you referring to this circle?

A Yes.

Q Are you indicating that this circle is a little out of place?

A Roughly. I didn't take notice where he was. I just know he was there.

Q This was not the same man that was over here?

A No.

Q Referring to page 17, line 6, again from your deposition, Mr. Bernardini:

"Q The first thing you did near the No. 4 hatch is to walk across the ship to the offshore side, is that right?

"A Right.

"Q Somebody was over there?

"A Right."

You are referring to the gentleman over here, are you not?

A There was one guy on this side too.

Q Mr. Bernardini, did you give that testimony?

A Yes.

Q Were you then referring to the man on the other side?

A Can I have the question again?

Q "Q The first thing you did at the No. 4 hatch was to walk across the ship to the offshore side, is that right?

"A Yes.

"Q Somebody was over there?

"A Right.

"Q He was standing near --

"A He was pulling the boom over on the off-

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shore side. He was fixing it so I didn't swing."

That man, that man we were talking about during this part of your testimony, he is the man that is on the offshore side?

A Right.

Q Turning to page 18, line 7 --

MR. STEARNS: Your Honor, I think I might go back and read continuously. I am back on page 18, line 13.

"A He was pulling the boom over on the offshore side. He was fixing it so it didn't swing.

"Q He was --

"A By himself.

"Q No one else was there?

"A No.

"Q What was he handling?

"A The guy.

"Q At the moment you approached him he was handling the guy?

"A I said, 'Where is the ladder?' That is what you normally do. I don't think they had a ladder around (indicating).

"What he said, 'You are a hold man?' and I said, 'Yes.'

"He said, 'You have to go down the hold.'

"Q What was this guy's name?

"A I don't know. When you go on the ship you don't know everybody you work with.

"Q What kind of man was he, white man, colored?

"A A white guy.

"Q How big was he?

"A Small. He was an Italian.

"Q Do you know his name today?

"A No.

"Q He was a longshoreman?

"A Right.

"Q Was he the only one standing on the deck?

"A No. As I walked by the ladder there was, I think, a mate or a seaman, the mate."

MR. AUSLANDER: Would you read the next question and answer?

MR. STEARNS: This is not relevant to the point I am trying to make but I will read it.

"Q What do you mean when you say you were walking by the ladder?

"A I mean by the gangway. Not by the

gangway. By the No. 4 hatch he was standing, by the coaming on the inshore side."

I am turning to page 41, line 19:

"Q Did you see this other Italian guy at any time?

"A No.

"Q You do not know his name?

"A No, he doesn't know me either.

"Q You have not seen him since?

"A Maybe I work with that gang once or twice on the waterfront.

"Q You have not seen him in three years, as far as you know?

"A I would not know him if I looked at him now. He was a small guy.

"Q He is the only guy as far as you know, he and the mate were the only two people on deck?

"A To my recollection, right.

"Q As far as you know now, these are the only two guys?

"A Yes."

Q Do you remember giving that testimony?

A Right.

Q Now you are saying there was a third guy?

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A I said before the accident happened. After the accident happened -- you said before the accident. After I fell there was a guy on that side.

Q Mr. Bernardini, did you tell me any place in 61 pages there was a third man on this deck?

MR. AUSLANDER: Objection.

THE COURT: Sustained.

Q Do you remember this question and this answer, page 42, line 7:

"Q He is the only guy, as far as you know, he and the mate were the only two people on deck?

"A To my recollection, right.

"Q Those are the only two guys?

"A Yes."

Do you remember those questions and do you remember giving the testimony I just read?

A Yes.

Q And now you are saying there is a third one?

A After the accident I saw one.

Q When you testified at your deposition did you tell me there was a third man on the deck?

MR. AUSLANDER: Objection. The witness will answer what is asked of him.

THE COURT: Sustained.

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Q Where was the ladder leading into the No. 4 hold?

A I still don't know where it is.

Q Do you know what a coaming ladder looks like?

A Yes.

Q That would be a ladder affixed to the side of the coaming, is that right?

A Right.

Q If you could see the coaming, you could see whether or not there was a ladder there?

A Yes.

Q You testified that you walked completely around, walking around the coaming looking for a ladder, you have testified to that, haven't you?

A I said I went across the way there and asked the guy where the ladder was.

Q You did that, then you continued walking around looking for the ladder in the path that is described by these lines?

A Because he said it was on the other side.

Q Did you go around the No. 4 hatch looking for a ladder?

MR. AUSLANDER: Objection.

THE COURT: Overruled.

A The man said it was on the other side.

Q Were you looking for it?

A I was going on the other side to look for it.

Q Were you walking around the hatch in order to find the ladder?

A Yes.

Q Did you testify yesterday that you could see whether there was a coaming affixed -- there was a ladder affixed to the inside of the coaming?

A Not at that time. When there is a coaming like that, there is no ladder on the inside.

Q Did you know that before you started walking around the hatch?

A They usually don't have it.

Q Did you know there was not a coaming ladder before you started to walk around the hatch?

A No. I didn't know where the ladder was. That is why I went around the deck.

Q As you were walking around the hatch as you were looking for a ladder, did you know there was no ladder affixed to the coaming?

A No.

Q Were you checking, looking to see whether you would find a ladder on the inside of the coaming?

A No.

Q Were you checking, looking to see whether you would find a ladder on the inside of the coaming?

A I went to the offshore side and asked the man rigging up where was the ladder.

Q Mr. Bernardini, again, if you can't answer this question tell me and say you can't answer.

As you walked around saying you were looking for a ladder, were you checking, looking to see if there was a ladder at any point on the inside of the coaming?

A No.

Q You were not looking there for a coaming ladder, is that right?

A Right.

Q You could have seen whether there was a coaming ladder by looking over at this corner?

A It was too high to look down.

Q It was three feet high?

A Maybe a little higher.

Q Your testimony is that if you stood here at the forward inshore corner with your chest right up against it, or whatever part of your body up against this corner, you couldn't see whether there was a ladder on any one of the four inside walls of the coaming?

A Right.

Q What kind of ladder were you looking for?

A A ladder that goes against the side of the ship.

Q An escape hatch ladder?

A That goes into the hold of the ship.

Q Were you looking for that ladder?

A I was looking for the hold ladder.

Q There are two kinds of ladders on ships that permit you access to the hold. Some have coaming ladders and some have escape hatch ladders?

A Right.

Q You weren't looking for the coaming ladder?

A I was looking for the coaming ladder. I didn't know where the ladder was, that is why I went across the way to ask the gangway man where the ladder was.

Q Were you looking for that ladder?

A That is the first time I was on that ship.

Q Were you looking for the coaming ladder?

A I asked the man on deck where was the ladder and he told me on the other side.

Q What kind of ladder were you looking for?

A Usually you have a coaming ladder and an escape

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hatch; sometimes you have two of them.

Q You told me a moment ago thatyou weren't looking, you weren't checking for a coaming ladder. Were you or weren't you?

A I was looking for the ladder to go down the hold.

Q Were you checking the coaming to see if it was against --

A That is what I asked the man for.

Q What did he tell you?

A He didn't say nothing.

Q What is an escape hatch?

A It's something around a hole where you couldn't fall.

Q Would you say it looks like a bathroom hamper built into the deck where the lid flips back?

A Yes.

Q You didn't see one at any time?

A No.

Q If you had seen it you would have recollected it?

A Yes.

Q When you fell, Mr. Bernardini, or when you say you fell, you claim you got grease on your jacket?

A Right.

Q What part of your jacket?

A The shoulder.

Q That is the same shoulder, the right shoulder, that struck the coaming?

A Right.

Q Was there grease on the coaming?

A There could be grease on the pallet.

Q Was there grease on the coaming?

A I don't know. I couldn't recollect.

Q Did you tell me at your deposition that you had grease on your jacket?

A Yes.

Q Did you tell me that to impress me with your claim that there was grease on the deck?

MR. AUSLANDER: Objection.

THE COURT: Sustained.

Q Turning to page 31, line 20, actually line 19:

"Q Of course you did."

MR. STEARNS: I ask counsel to acknowledge that that is in response to something Mr. Bernardini said before.

MR. AUSLANDER: I think he would have to read a couple of questions and answers prior thereto and

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start off with that.

MR. STEARNS: Okay, I will do that.

MR. TESTA: I think you could read the question just before that.

Q "Q How many heel marks did you see?

"A After it happened I was nervous.

"Q How many would you say you saw?"

MR. TESTA: I will object to this. The witness has testified this is not being read for the purpose of indicating this is a prior inconsistent statement.

THE COURT: It is being read for clarification. Counsel is getting at something else and there was an objection what he was starting with was more or less in midstream and he has backed up a couple of questions.

This is merely being read to clarify what is to come.

MR. STEARNS: Yes, but there is an additional purpose. There is testimony I think inconsistent with Mr. Bernardini's --

THE COURT: Please, no speeches. I have ruled and you may read.

MR. TESTA: I want to go on the record that

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this is not being offered as a prior inconsistent statement of the witness and it is not proper to offer it as corroborative.

THE COURT: It is offered for the purpose, in my judgment, for clarification and we will cover the rest of it as it comes along.

There was testimony already, as I recall it, by this witness that he had seen some heel marks on the deck.

Again, ladies and gentlemen of the jury, in all these matters it is your recollection that governs. I am here listening as you are. I am taking certain notes but I don't pretend to have a photographic memory.

If a question comes up as to what a witness said and you are not clear in your own recollection when you are in that jury room deliberating on this case, you may call and we can have any portion of the testimony read back to you. The court reporter is here and as You can see he has been taking down all the testimony.

If you get to a point and your recollections are not clear,and none of us has a photographic memory, the court reporter is available and I will bring the jury out and have read back to you any portion of the testimony you wish read.

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BY MR. STEARNS:

Q Page 31, line 11:

"Q How many heel marks did you see?

"A After it happened I was nervous.

"Q How many would you say you saw, two or three heel marks?

"A There were more than six or seven, I know that.

"Q You were dodging them on your way going forward and you slipped?

"A I wanted to get over them.

"Q Of course you did. Which foot did you slip with, which foot slipped?

"A My left.

"Q Then you fell. Which way did you fall?

"A I fell this way.

"Q Indicating that you fell forward, is that right?

"A Right."

Page 40, line 11:

"Q He was looking at you too?

"A Yes."

MR. TESTA: Why don't we start at the top of the page?

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MR. AUSLANDER: Before we go into this again, your Honor, now I am going to object along with Mr. Testa that we are going over testimony which is repetitive. It has nothing to do so far as I could see with any consistency with what has been testified to prior by the witness.

THE COURT: Overruled.

Q Line 3:

"Q Who saw you fall? The mate was where?

"A I think it was the mate. He was not a longshoreman.

"Q He was about 10 feet from you?

"A A little more. He was looking at me. I know he will say I didn't fall.

"Q Ten or 15 feet?

"A Yes.

"Q He was looking at you too?

"A Yes.

"Q He saw you fall?

"A When I fell he came over to me and said, 'You wait right there. I will call the boss of the ship, the stevedore.'

"Q Did he --

"A I guess he did. They all started running.

"Q He said, 'Wait right there'?

"A He told me not to get up.

"Q At the time you were lying on the pallet, weren't you?

"A Yes.

"Q Face down?

"A Right."

Mr. Bernardini, have you ever seen pallets arranged in the fashion described by you and used by longshoreman as walking boards?

A They never have it across like that.

MR. TESTA: Objection. If this witness is going to be asked to give expert testimony, this is improper.

THE COURT: I don't consider it expert testimony. He was 25 years a longshoreman, having started as a longshoreman in 1946, and he has been asked if he ever saw this and I will permit the question to be answered if he can.

You started to answer it. I don't know that the jury heard your answer.

Let me have the question read back to the wit-

ness.

(Question read.)

MR. TESTA: Objection. There is no foundation being laid for this testimony. There is no indication what the manner described by him -- the question is improper.

THE COURT: Overruled.

Q Have you seen pallets used as walking boards?

A Yes, but they always have a walking space in between them?

MR. TESTA: Same objection.

THE COURT: Overruled.

Q Do you remember this question and giving these answers at page 32, line 17:

"Q Could it have been 10 pallets?

"A I don't think so.

"Q How many would you say?

"A I could not say. If I would tell you I would tell a lie. I know it was one or two high there. It was because the coaming was high.

"Q And it was used as walking boards?

"A Correct.

"Q Isn't that what you think about this, you have been around these pallets for 25 years?

"A Yes.

"Q So the guys could walk over it?

"A Yes."

You had seen pallets used as walking boards before?

MR. AUSLANDER: I will object. On that same page 33, line 13, there is a question and answer specifically that Mr. Stearns asked and before I make any more comment I would ask your Honor to read it and see whether it should be included.

MR. STEARNS: I will read anything you want.

THE COURT: I think that is fair enough.

MR. STEARNS: "Q You have seen pallets like this set up many times in 25 years, pallets set up like that?

"A No."

BY MR. STEARNS:

Q Do you remember that question andthat answer?

A Yes.

Q The longshoremen set up these pallets?

A The gangway man.

MR. TESTA: If your Honor please, I would like to object to that question and answer, your Honor, because

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there is no indication this witness knows who set up these pallets. He had just come aboard the ship.

THE COURT: The answer has been given. You will have your opportunity to examine him on it and I would think it is a question you should ask on your own examination. But the answer having been given without any objection previously, I think it is best to explore it on cross examination.

BY MR. STEARNS:

Q Page 36, line 14, do you remember this question and these answers:

"These pallets were at about the middle of the hatch, right?

"A About the middle, I guess"?

MR. AUSLANDER: Again, if Mr. Stearns is going to read something he should start three or four questions prior.

THE COURT: Sir, he doesn't need any assistance in this regard. If you choose at some time to clarify the matter by additional questions, you may do so, but he has the right, it would seem to me, to read the questions as he sees fit. Needless to say, if the questions are cast in an unfair manner, I trust he wouldn't read them.

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MR. AUSLANDER: I don't state he has to read them. He is starting out of context.

MR. STEARNS: I don't think that argument can be made in this case.

THE COURT: Let's proceed.

BY MR. STEARNS:

Q Question on page 36, line 17:

"You walked half the length of the hatch before you slipped, is that fair to say, you walked half way back up?

"A About the middle."

Line 29.

And by the way, Mr. Bernardini, the last two questions and answers, do you remember hearing those and giving those answers?

A Yes.

Q Those answers were true, were they not?

A Yes.

Q Page 29, line 13 -- line 10:

"Q You were walking completely around the hatch, right?

"A Yes.

"Q You were walking toward the front of the ship?

"A Yes."

MR. AUSLANDER: I will object, if your Honor please.

THE COURT: Please.

Q "Q And the hatch is still on your left, correct?

"A To me it's on the left.

"Q As you remember it?

"A I put a picture of it in my mind.

"Q You walked between the coaming and the rail, is that correct? The dock is on your right?

"A Yes.

"Q What happened to you then?

"A There were a lot of spots on the ground, grease. I tried to dodge it and I fell.

"Q You saw these spots of grease on the deck and you tried to dodge them?

"A Yes.

"Q And you slipped?

"A Yes.

"Q And you fell down?

"A And there were pallets one or two high on deck.

"Q How did you try to dodge these?

"A You know, like tippytoe steps.

"Q You saw them and began to take steps so your foot would not come down on these spots of grease that you saw?

"A No.

"Q And you did not have any luck doing this, you stepped on one?

"A I fell, right."

Do you remember those questions and those answers?

A Yes.

MR. AUSLANDER: Again, your Honor, I fail to see where this is inconsistent with what the witness has already testified to three, four, five times, and that was my objection before along with Mr. Testa's objection.

MR. STEARNS: Your Honor, I will say, and I prefer to say it at the side bar.

THE COURT: No. The objection is overruled. Each of you can argue your points later.

Q How many accidents have you had since this one?

A Three.

Q Have you been seen by Dr. Graubard in connection

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with these three other accidents?

A I saw Dr. Tagliagambi.

Q Mr. Bernardini, would you just answer the question?

A Yes.

Q Were you seen, examined --

THE COURT: He answered the question. He said yes.

Q Do you know whether Dr. Graubard found a percentage disability of parts of your body in connection with these other accidents?

MR. AUSLANDER: Objection. I don't see the relevance. We are talking about a shoulder accident in this case.

A I don't know.

THE COURT: He said he doesn't know so under the circumstances I will let the answer stand.

Q Did you lose time for work as a result of these other accidents?

A Yes.

Q What parts of your body were hurt or you claim were hurt in the most recent accident you had?

A My knee.

Q When did that happen?

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A '72, January.

Q How long were you out of work as a result of that accident?

A Six weeks.

Q The same amount of time you were out this time?

A Figure a little less. About five and a half weeks, roughly.

Q After that accident in January of 1972, when you went back to work after six weeks, did you lose any intermittent time? Did you lose an occasional day because of anything that had to do with your knee?

A No. Maybe a couple of days. The knee ain't important. The shoulder is what you do your work with.

Q The knee is not important climbing down a ladder into a hold, is that right?

A It is important.

Q You lost a couple of days as a result of your knee, is that right?

A I don't keep a record on that.

Q You testified in this case that you lost from 15 to 19 days as a result of your shoulder, didn't you?

A Right.

Q You didn't keep a record of those?

A Right.

Q You did not?

A I said I didn't keep a record.

Q You don't have any record to show how many days you lost as a result of your knee injury in 1972?

A Right.

Q But you did lose some days?

A A few days.

Q When is the most recent day you lost as a result of your knee injury?

A I don't recollect.

Q How about the other two accidents you have had since this one?

A I hurt my two wrists.

Q Did you lose days from work because of that?

A Yes.

Q Was that two separate accidents?

A Two separate accidents.

Q Of the first of these wrist injuries, how many days did you lose from work?

A About 18 days.

Q After you went back to work, after you first wrist injury, did you lose some intermittent additional time?

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A It wasn't that bad, the wrists. I didn't lose much days.

Q Did you lose a few?

Would you answer it for the record. He can't see your head shake.

THE WITNESS: What is the question?

(Question read.)

A No.

Q You didn't lose any intermittent time as a result of the first wrist injury?

MR. AUSLANDER: He answered that. He said no.

MR. STEARNS: I will withdraw it if it is clear.

THE COURT: All right, it is withdrawn.

Q How about the second wrist injury; how much time did you lose as a result of that one?

A About 21 days.

Q Did you lose any intermittent time as a result of that?

A I don't recollect.

Q Is it possible you did?

A I couldn't recollect. It happened last year. I don't know if I lost days on account of that or what.

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Q You have no record?

A No.

Q Did you have the same attorneys on all these cases?

A No.

Q On how many of the three subsequent accidents subsequent to this claim of accident were you represented by the attorneys who represent you in this case?

MR. AUSLANDER: I will object to that. I don't see the relevance of who he decides to have as counwel.

THE COURT: I fail to see it. I had no problem with the first question, but I think going further in this is probably not relevant and material and I will sustain the objection.

BY MR. STEARNS:

Q Mr. Bernardini, just to make sure I understand your testimony, you say that the mate, you said yesterday that the mate, the man that turned out to be the mate, was standing near the gangway.

A A little over further.

MR. AUSLANDER: If your Honor please, this is just repetitive, going over and over again the same material.

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MR. STEARNS: I will admit this has been gone over before but to put some continuity --

THE COURT: I think the continuity will come in your closing argument. I think you have put the questions to the witness previously.

MR. STEARNS: I agree, I have.

No further questions.

CROSS EXAMINATION

BY MR. TESTA:

Q Mr. Bernardini, have you always worked as a hold man?

A Yes.

Q To go down into a hold you have to use ladders, don't you?

A Yes.

Q And that involves the use of your knees?

A Sometimes.

Q And you had a knee injury just recently?

A Right.

Q Did I understand you to say recently that you said that was not important, the injury to your knee?

A It wasn't that bad.

Q Are you able to go up and down ladders with this knee injury you had?

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A Yes.

Q It's only the shoulder that bothers you, is that right?

A Yes.

Q The hatch coaming we are talking about, I think you originally said it was three and a half to four feet high?

A Roughly.

MR. STEARNS: Objection. It is not my recollection he said that.

THE COURT: It is mine. At the same time I remember you indicating to me your chest in the area of your shoulder would be the place where the top of the hatch coaming would be, is that right?

THE WITNESS: Right.

Q How tall are you?

A About five-ten.

Q Whenyou went aboard this ship, and I believe you said this in response to Mr. Stearns' questions, you were looking for an escape hatch ladder, is that right?

A A ladder.

Q Butyou have already told him you weren't looking for a coaming ladder?

A I didn't say I was looking for an escape hatch.

I didn't know where the ladder was.

Q Do you have any recollection of having seen an escape hatch ladder at any time?

A No.

Q In your travels around the hatch at some point you heard a cracking noise?

A The boom wire.

Q And after you had satisfied yourself there was no danger from that direction you kept walking forward?

A Yes.

Q When you first went aboard did you see these pallets that you have been talking about?

A I didn't take notice.

Q Did you look to your left at any time down the inshore side?

A As soon as I came up I went left and I went right to the other side. I didn't take notice whether the pallets were there.

Q You don't know who put those pallets there, do you?

A I don't know who put them, no.

Q As a matter of fact, you were only on that ship about five minutes before something happened to you, isn't that right?

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A Right.

Q You went aboard the ship at 8:45 a.m, right?

A 8:40.

Q If I told you this accident happened at 8:50 would you agree with me?

A It was about five minutes after

Q The accident you claim happened at 8:50?

A Yes.

Q So all told you were on the ship for five minutes?

A Yes.

Q You have no idea whatsoever who put those pallets there, do you?

A No.

Q After you fell, I believe you said you complained to the mate and the mate called somebody. He told you to stay right where you were and he called somebody?

A Yes.

Q Do you know who he called?

A He called the foreman of the ship.

Q Did the mate say anything to the ship's foreman in your presence?

A No. He said the man fell down.

Q Did he say that he saw you fall down?

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A He just said the man fell down. I don't recollect what he said. All I know is he said the man fell.

Q Did you make any complaint about oil and grease at that time?

A I was a little too nervous then.

Q Did you tell the chief mate or whatever chief mate this was that you slipped on oil and grease at that time?

A No.

Q Did you tell that to the ship's foreman?

A No.

Q You didn't mention oil and grease?

A I was worried about my shoulder.

Q But you didn't see fit to mention the oil and grease, did you?

MR. AUSLANDER: Objection to the form.

THE COURT: Sustained as to form.

Q You didn't mention the oil and grease, did you?

A No.

Q You didn't mention it to the mate or the ship's foreman.

You went to the timekeeper's office, is that right?

A Right.

Q And you didn't mention the oil and grease to the timekeeper either, did you?

A He asked me what happened and I said I fell and hit my shoulder.

Q You didn't tell him there was any oil and grease?

A All he asked me was what happened and I filled in a report and went to the doctor.

Q He asked you what happened and you didn't tell him you slipped on oil and grease, did you?

A No.

Q So there are three people, the mate, the ship's foreman and the timekeeper, and you didn't mention the presence of oil and grease to any one ofthose three?

A Because I was worried about my shoulder.

Q Didn't you think it was important to mention to them that you claimed you slipped on oil and grease?

A Right then, no.

Q You knew that he was going to go to make a case out of this, didn't you?

A No, I didn't.

MR. AUSLANDER: Objection.

THE COURT: I think that the question is

objectionable but since an answer has been given and it is in the record, the jury has heard it, I will overrule your objection.

Mr. Bernardini, when you see your counsel rising to make an objection stop and wait for him to make his objection; then I can rule. Once the answer is in the record it presents some other problems.

BY MR. TESTA:

Q When for the first time did you consult a lawyer about this case?

A When I went to the doctor the doctor told me to go back to work in three days, so I called Mr. Adler up that I couldn't go back to work.

Q Is Mr. Adler a lawyer?

A He is a lawyer.

Q Did you tell him about oil and grease?

A Yes.

Q You did?

A I told him I had to go back to work. He made an appointment with the Labor Board to go see the Labor Board doctor.

Q Did you have any discussion at that time with Mr. Adler about oil and grease on the deck?

MR. AUSLANDER: I will object to any kind

of conversations the plaintiff may have had with his own counsel, which I believe is privileged.

THE COURT: You wish to assert the attorney-client privilege?

MR. AUSLANDER: Yes. I don't think it is proper what counsel and client may have said or not said to each other.

MR. STEARNS: If I may be heard on that. The attorney-client privilege, as I understand it, belongs to the plaintiff and it is not for the attorney to waive it, and in view of the claim being made here I don't think the plaintiff has any right to it.

THE COURT: I would have to suggest one thing. Relative to any conversations you had with Mr. Adler while he was serving as your attorney, you are entitled to claim, if you choose to, an attorney-client privilege. Counsel has just asked you to tell the jury about conversations you had with Mr. Adler. Are you prepared to answer his questions or do you wish to claim the attorney-client privilege?

THE WITNESS: The attorney-client --

MR. AUSLANDER: It is part of the attorney's work product, which is even paramount.

THE COURT: I would suggest this. The

witness has just indicated he wishes to claim the attorney-client privilege. I will sustain his claim of privilege in that regard.

MR. AUSLANDER: I am objecting and I want it stated for the record that I object to this line of questioning as it develops into the attorney's work product.

THE COURT: It seems that your objection, which was interposed for the record, is superfluous at this point in view of the fact I have sustained an alternate objection, which is the assertion of the attorney-client privilege.

You may proceed.

BY MR. TESTA:

Q When first did you consult a lawyer in the office of Zimmerman & Zimmerman with respect to this case?

A I called him up when I had to go back to work.

Q When was that?

A About the 2nd or the 3rd. The 2nd or 3rd of November.

Q Did you ask them to commence a lawsuit for you?

A I said that the doctor told me to go back to

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Q The question was did you ask them to commence a lawsuit for you?

MR. AUSLANDER: Again, your Honor, I believe that these are improper questions.

THE COURT: Sustained.

Q Mr. Bernardini, have you discussed this case with anybody since the time that this accident allegedly happened on October 28, 1969 until today?

A What are you talking about? I still don't understand the question.

MR. TESTA: Will the reporter read the question back.

MR. AUSLANDER: He didn't say he didn't hear the question. He said he didn't understand the question.

THE COURT: Perhaps you can restate the question.

Q What I am asking you is, you said you had an accident on October 28, 1969. I am asking you if you discussed that accident or how it happened with anybody from that date until this date?

A Yes.

Q Who did you discuss it with?

A With my attorney, Zimmerman & Zimmerman.

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Q Did you discuss it with anybody else?

A My lawyer.

Q Anybody else?

A I don't know what you meant. My lawyers.

Q Besides your lawyers, did you talk --

A Mr. Stearns, I talked to him about it.

Q That was at an examination before trial in this case.

I mean aside from your lawyers and your examination before trial in this case, did you talk to anybody else?

A No.

Q When for the first time was the question of oil and grease injected into this case?

MR. AUSLANDER: Objection as to form.

THE COURT: Sustained.

Q Let me put it to you this way: did you talk to anybody in preparation for this trial?

MR. AUSLANDER: I object to that also. Obviously the man was in my office.

THE COURT: Please. I think you know the practice.

Overruled.

Q Did you talk to anybody in preparation for this

trial?

A Yes.

Q When was that?

A Yesterday morning.

Q Before yesterday morning did you go into Mr. Auslander's office before yesterday morning and discuss the case with him?

A Yesterday morning I went there to discuss this case for today, to tell the truth.

Q And that was the only time you talked to him about this case, yesterday morning?

A Yes.

Q Were you ever in his office before yesterday morning?

A Yesterday morning I was there.

Q Before yesterday morning were you ever in his office?

A Yesterday morning I was there.

Q I understand that. I am talking about before yesterday morning?

A The only time I was there was when I saw Mr. Adler to make the appointment to go see the Labor Board.

Q That was in 1969?

A Right.

Q Between 1969 and yesterday morning you haven't discussed this case with your lawyer, is that what you are saying?

A Yes.

Q Did you know that this lawsuit was commenced?

MR. AUSLANDER: Your Honor, this whole line of questioning, if you want me to jump up after every question I will, but he keeps going into how, when, where we discussed the case.

THE COURT: He is not getting into the substance of the conversations; he is asking the question as to when the witness went to your office to discuss the case.

Today is Wednesday. We started the trial yesterday, Tuesday. As I understand your testimony, you met with Mr. Auslander at his office yesterday before you came here to court.

THE WITNESS: Right.

THE COURT: Mr. Testa has asked you when was the last time before that that you were in Mr. Auslander's office or your attorney's office.

THE WITNESS: In 1969 I was there. I explained the case to Mr. Adler --

MR. AUSLANDER: That is all.

BY MR. TESTA:

Q In between that date and yesterday morning you haven't discussed this case with your lawyer, is that right?

A No.

Q Or anybody else?

A One time in May, 1971, when I went for the pretrial.

Q You are talking now about the deposition which Mr. Stearns has been reading?

A Yes.

MR. AUSLANDER: This is discussing the case.

THE COURT: I think that is fair.

In other words, before you appeared at this examination before trial on May 6, 1971 did you discuss the case with your attorney?

THE WITNESS: Yes.

THE COURT: You may proceed.

Q Since then you had three other accidents?

A Right.

Q Were you here yesterday when Dr. Graubard said he saw you four or five times since Octoner of 1969? Did you hear him say that?

A Right.

Q Does that mean you had four or five accidents?

A He saw me but it wasn't all for accidents.

Q Only three times did he see you for accidents?

A Right.

Q These recent accidents we are talking about, I think one, you said, happened in 1973.

A 1972.

Q You said one happened in 1972, but these wrist accidents, when did they happen?

A 1972.

Q Both of them?

A 1972.

Q How about the knee accident, when did that happen?

A One happened in January, 1972 and the wrist happened I think in '72, around August.

Q Which wrist was that?

A The whole two wrists, right and left?

Q Did you have two separate wrist actions?

A The one I had in 1970 was a wrist action.

MR. AUSLANDER: I will object to this. I don't see the relevance. We keep going into irrelevant matters which don't in any way touch or deal with the

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shoulder we are talking about.

THE COURT: I am not sure they wouldn't be connected up by counsel, therefore I will overrule your objection. We are on cross examination.

Q Mr. Bernardini, was oil and grease involved in any of these subsequent accidents, the knee accident or the wrist accidents?

A No.

Q Do you remember how those accidents happened?

A Vaguely, yes.

Q Did you say vaguely?

A I know the recent one, 1972.

Q You didn't slip on oil and grease in those accidents?

A No, I was moving cargo --

Q I didn't ask you to tell me how it happened. You didn't slip on oil and grease?

A No.

Q Do you recall losing any time as a result of these wrist accidents?

A I don't recall.

Q Do you recall the exact day in August that this happened?

A The 27th or the 28th.

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Q Do you recall the date the accident happened in this case?

A October 28, 1969.

Q And these happened on August 28, 1972?

A Twenty-eighth, 27th.

Q Did you see Dr. Tagliagambe the same day this accident happened?

A Which accident?

Q The accident in this case that we are talking about.

A I saw the doctor.

Q Did you see him the same day it happened?

A Yes.

Q He treated you for a few days; then he told you you could go back to work?

A Yes.

Q He didn't tell you you had to go back to work; he told you you could go back to work?

A He said to go back to work.

Q Right. He didn't force you to go back to work; he said you were able to go back to work?

A Right.

Q And you decided to call Mr. Adler and he sent you to the Labor Board?

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A Right.

Q And is it your claim that Dr. Tagliagambe treated you after that for six weeks?

A Yes.

Q Throughout that six-week period didn't he keep telling you you would be able to go back to work after a few days after this accident?

A I went to the Labor Board and they said I needed more treatments.

Q Didn't Dr. Tagliagambe tell you you could go back to work?

A No, only that first time I met him.

Q Did he tell you you could go back to work on November 3, 1969?

A Yes.

Q Even though he treated you after that, he kept telling you you were able to work, didn't he?

A But I couldn't go back to work.

Q He kept telling you you could?

A He only told me once to go back to work.

Q Just once?

A Yes.

Q But you decided you weren't able to go back?

MR. AUSLANDER: Objection as to form.

THE COURT: Sustained.

Q I believe Mr. Auslander referred to the treatment that you gave yourself as self-help, is that right?

A Yes.

Q You not only decided you wouldn't go back to work but you decided to give yourself treatment --

MR. AUSLANDER: Objection.

THE COURT: Sustained.

Q Under direct examination you said you had no previous or subsequent accident, is that right?

MR. AUSLANDER: To his shoulder.

MR. TESTA: If your Honor please --

THE COURT: We will have to permit the witness to answer the questions, Mr. Auslander.

Do you recall stating on direct examination that you had no previous accidents?

THE WITNESS: With the shoulder. I got in my report that I had an accident in 1954.

BY MR. TESTA:

Q You did have a previous accident?

A In 1954. It's in my report. When I went for my pretrial I told the man.

Q What part of your body was hurt in 1954?

A My right ankle.

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Q When you said you had no subsequent accident, you had three subsequent accidents?

A One. I don't know what you are talking subsequent.

Q You had a knee accident and two wrist accidents?

A I am talking about before my right shoulder.

Q The word subsequent means after.

A Oh.

Q After the accident in this case you had three other accidents?

A My knee and my wrists.

Q So when you said you had no previous or subsequent accidents you didn't mean that, did you?

MR. AUSLANDER: Objection. He never said that.

THE COURT: Let's get back and find out what he did say again.

I will sustain the objection as to form and permit you to inquire in this area.

Q You meant that you had no previous and subsequent accidents to your shoulder?

A That is what I thought you meant.

Q I didn't ask you that question, Mr. Auslander did.

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Do you by any chance know who the man was on the offshore side that told you where the ladder was?

A No.

Q Have you seen him since?

A No. I don't see hin. I haven't been up the hall shaping. I don't know.

Q When this man on the offshore side pointed and said the ladder was over there on the inshore side, is there any reason why you couldn't come back the way you had originally gone?

A I just kept going around. I surmised he said on the other corner, probably.

Q And you have never been involved in an accident where anything happened with a boom?

A No.

Q You never had a boom fall?

A I wasn't involved with the falling but I was a witness.

Q Have you ever involved in an accident when boom fell?

A No.

Q The time this accident happened you knew the mate was watching you?

A I didn't know he was watching me, no.

Q Did you see that "The mate was there and it looked as though the mate was watching me"?

A He was looking. I don't know that he was looking at me.

Q Was he looking in your direction?

A He was looking in my direction.

Q And just recently when Mr. Stearns was asking you questions and reading from your transcript, you saidyou knew that he was going to say that you didn't have an accident, the exact wording being that "He was looking at me. I know he will say I didn't fall," right?

A Right.

Q What made you think he was going to say you didn't fall.

A Because when I went to my attorney and told my attorney about it he said, "He will probably say you didn't fall.

Q So your lawyer told you that the mate will probably say you didn't fall.

Did he also tell you to say there was oil and

grease on the deck?

A No.

MR. AUSLANDER: Objection.

THE COURT: He answered it no.

MR. AUSLANDER: I wish you would direct Mr. Testa not to put questions like that which he knows are absolutely improper because it is impugning the integrity of me and my office.

THE COURT: Mr. Testa, proceed with your inquiries. The question was asked whether it was proper or not in the first instance. The answer was in the negative. The jury will not imply anything from the question or any other question. Implications come from answers, not from questions, ladies and gentlemen.

Q When you reported this accident to the mate the ship's crewman and the timekeeper did you tell any one of them you heard a cracking sound from the boom?

A I didn't think it was important but after it happened I surmised what had happened.

Q My question was did you tell the mate, the ship's foreman or the timekeeper that you heard a cracking sound from the boom immediately before you had this accident?

A No. I didn't remember that.

Q You didn't tell them about this oil and grease and you didn't think either one of them was important?

MR. AUSLANDER: Objection.

THE COURT: There are at least two questions in one. Sustained.

Q When for the first time was that injected into the case, the question of the boom, the cracking noise from the boom?

MR. AUSLANDER: Objection.

THE COURT: Sustained.

Q When for the first time did you tell anybody about the cracking noise from the boom?

MR. AUSLANDER: Again I object to that.

THE COURT: Overruled.

Q Do you understand my question.

A Let me hear it again.

Q When for the first time did you tell anybody that you heard a cracking noise from the boom immediately before the accident happened?

A After I calmed down and everything, then I realized and I told my attorney.

Q When was this?

A When I called my lawyer when I had to go back to work and he made an appointment with the Labor Board.

Q Are you talking about Mr. Adler?

A I explained to my lawyer.

Q Did you tell Mr. Adler about the cracking noise?

A Yes.

Q At any time during the course of the deposition that you gave on May 6, 1971 did you say anything about hearing a cracking noise?

MR. AUSLAND: I object unless he is asked whether he was asked that.

THE COURT: Overruled -- I am sorry; sustained.

Q At any time during the course of your deposion on May 6, 1971 were you asked whether you heard such a sound and did you say you heard such a sound?

MR. AUSLANDER: That is two questions.

THE COURT: Sustained as to form.

Q You finally went back to work, is that right, after this accident?

Q Yes, December 11th.

Q When?

A December 11th.

Q December?

A December.

Q Did you go back to work as a hold man?

A Hold man.

Q You have been working as a hold man ever since?

A Yes.

Q Full time?

A No, not full time. I lost a few days.

Q You work whenever there is work as a hold man?

A If there is work, I go to work. If there is pain, if I don't feel up to going to work that day, I don't go to work.

Q Since December 11, 1969 have you been working as a hold man as regularly on that date to this as you did before the accident?

A No.

Q How many days a week did you work before this accident as a hold man?

A At the shape-up?

Q You were not part of a regular gang.

A I had to shape up. If there is no work for the gang we would shape up.

Q If there is no work, there is no work, right?

A Right.

Q And this has nothing to do with your shoulder or anything else, there is just no work available?

A I could work every day if I wanted to.

Q That is right, you could work every day if you wanted to.

But that is only if there is work available for you.

A There is work every day. I could work every day.

Q Is there work available to you as a hold man every day?

A Yes.

Q Have you been working every day as a hold man?

A No.

Q There is no question you had three other accidents here?

A Right.

Q And you weren't working as a hold man because of those, isn't that right?

A Are you going back to 1969 up to today?

Q That is right. You didn't work as a hold man, you said, for some five and a half to six weeks because you had a knee accident?

A Right.

Q When was that, in 1970?

A In 1973.

A In 1973.

Q 1973.

A 1972, I meant to say.

Q The wrist accidents also kept you out of work for a while, didn't they?

A Right, about three weeks.

Q How long?

A About three weeks.

Q If you shape up to work and you don't want to work you can just go back home?

A I have to work.

Q Don't you get paid just the same whether you work or not?

A No. I have to work every week. I have to bring home a payroll every week.

Q If there is a job for you as a hold man, there is work there, you shape up and you don't want to work and you go home, don't you get paid?

A But I have to work every day.

Q Have you been working every day?

A On and off since the last year or so.

Q You were working right now as a hold man, aren't you?

A Yes.

Q You never asked to be transferred to any other category?

A No.

Q You are able to do the job of a hold man?

A When there is hard work it is tough for me to do it.

Q But you are doing it?

A I am forced to do it.

Q Are you working as a hold man?

A Yes.

Q Nobody is forcing you to do this, you are doing it, aren't you?

After this accident happened you said you saw heel marks there. You didn't get down there and count the heel marks, did you?

A No.

Q As a matter of fact, those were your heel marks, weren't they?

A I couldn't say.

Q What kind of shoes did you have on?

A Work shoes.

Q What kind of soles and heels did they have?

A Neolite.

Q Neolite sole?

A Neolite.

Q What kind of heel?

A It must be the same. They are work shoes. That is what they have.

Q They were made out of leather?

A No.

Q What are they made out of?

A Neolite. Like a rubber base.

Q Like a rubber heel?

A It's called Neolite.

Q Is that like a rubber heel, is that what you are saying?

A I assume.

Q I am asking you.

A It's Neolite soles and heels. When I bought the work shoes that is what I get, Neolite.

Q You are using a word and I am asking you to tell me what it means.

MR. AUSLANDER: The jury understands what it is.

THE COURT: The objection is overruled. If the witness can answer.

Q Is Neolite the same as leather or does it look like rubber?

Q Does it have little indentations or marks on it or is it smooth?

A It is not smooth; it has the ripples.

Q And these heel marks that you saw in this grease, did they have little ripples and indentations?

A I don't know.

Q You didn't look at it and you don't know how many there were either, do you?

A No.

Q When you said six or seven before you were not telling the truth?

MR. AUSLANDER: Objection.

THE COURT: Sustained.

Q When you fell did your shoulder strike the pallet?

A No, sir.

Q Did any part of your body strike the pallet?

A My body.

Q What part of your body?

A My body.

Q What part, your shoulder, your stomach, the knees, your head, what part of your body hit the pallet?

A My whole side when I tripped down.

Q Your whole side hit the pallet, is that right?

A Yes.

Q Can you just show me on your body where you struck the pallet, point to the part of your body?

MR. AUSLANDER: He said his whole body.

THE COURT: Stand up, if you will, and point to the portion of your body that came into contact with the pallet.

THE WITNESS: When I tripped down -- when you are falling you don't look what part of your body hit. I just fell. I slipped on the pallet, on the grease, and when I twisted I twisted my body. The whole side. It could be my right side.

THE COURT: The witness has indicated by a brushing of his hands up and down his whole side and has stated his whole side could have been the right side.

BY MR. TESTA:

Q Do you have any indication as to what specific part of your body, without the general statement of your whole side, any specific part?

MR. AUSLANDER: Objection.

THE COURT: Overruled.

MR. AUSLANDER: It's an impossibility.

THE COURT: If he doesn't know, he will say so.

A I know my whole side. I couldn't say what part of the body.

Q You don't know whether any particular part of your body hit that pallet?

MR. AUSLANDER: Objection.

THE COURT: Sustained.

BY MR. TESTA:

Q You don't know whetheryour feet hit that pallet, do you?

MR. AUSLANDER: Objection. He is breaking it down and it's the same as the first question.

THE COURT: There were some questions and answers asked and given previously in this regard, including at least one asked by the court, and I will permit an inquiry in this area.

Q You don't know whether your feet hit the pallet or not?

MR. AUSLANDER: Objection as to form.

THE COURT: Yes.

Q Do you know whetheryour feet hit the pallet or not, or is it just your entire body that you are talking about?

A When I slipped over there I tripped --

Q Mr. Bernardini --

THE COURT: Let him finish his answer.

A I was on the grease, right. When I fell down the pallets were there; I fell on the pallets.

Q I understand that. I am asking you whether you know and whether you can tell the judge and the jury here whether or not your feet hit those pallets at any time. Do you know that or don't you?

A I don't remember.

THE COURT: I think at this point we will take our midmorning recess. It is 11:35, and I have one matter which I must handle during the course of your recess.

I would think your midmorning recess should run something between 10 and 15 minutes. We will then resume with this trial and we will proceed to 1:15. The reason for that is that I have a group coming at 2 o'clock to observe this case, students. We have them from time to time. And I am going to speak with them from 2 to 2:15 to orient them. At 2:15 I will take a plea in a criminal case, which also should take about 15 minutes, and I will ask the jury to return at 2:30.

We will take the midmorning break and we will go to 1:15.

May I suggest during the period you are in the

jury room how you do not discuss the case among yourselves and please continue to keep an open mind.

We will resume in approximately 10, it might be as long as 15 minutes.

(Recess.)

(In open court; jury present.)

THE COURT: You may resume, Mr. Testa.

BY MR. TESTA:

Q Mr. Bernardini, when you went to see Dr. Tagliagambi, did you tell him that you slipped on oil and grease?

A I don't remember.

Q He asked what happened though, didn't he?

A Yes. I don't know what I told him.

Q Did he ask you how the accident happened?

A He asked me but I don't know what I told him.

Q You have indicated that you had one prior accident, is that right?

A Before?

Q Yes.

A Before my shoulder?

Q Before the accident involved in this case.

A That's right.

Q Is it possible you had more than one?

A I had one with my eye. I had a couple of stitches.

Q What was the other one?

A My right ankle.

Q So there were at least two prior accidents, is that right?

A Yes.

Q And three subsequent ones?

A Right.

Q I am going to direct your attention to this diagram on the blackboard and you drew a line indicating the course that you took, is that right?

A As far as I recollection, because it happened four years ago.

Q This line is the course that you took?

A I know I went to that side.

Q Just answer my question.

You took a piece of chalk and you drew a line from this point which is at the head of the gangway over here toward the starboard forward corner of the No. 4 hatch; you drew this line, did you not?

A Yes.

Q Then you drew another line indicating that you walked from the inshore side to the offshore side in front

of the No. 4 hatch, correct?

A Right.

Q And this is the line that you drew?

A Right.

Q When you got over hereyou say you spoke to somebody and asked him where the ladder was?

A Right.

Q Did you draw this circle?

A Approximately where he was standing.

Q And you say he pointed over to that direction, and you were asked what courseyou took and again you took a piece of chalk and you drew this line?

A Yes.

Q That is the heavy line?

A Right.

Q To distinguish it from the line that Mr. Auslander drew when he made this diagram originally?

A Right.

Q This one is Mr. Auslander's line and the heavier line is the line that you yourself made?

A Right.

Q And this indicates the path that you took?

A Right.

Q And you continued that line around behind the

No. 4 hatch, did you not?

A The back, right.

Q And you made this line indicating that that is the way you went?

A Right.

Q How close is this line to the back of the hatch, the after end of the hatch, if you can tell me?

MR. STEARNS: I believe he testified it was one foot.

MR. AUSLANDER: If your Honor please, it is obvious this drawing is not to scale.

THE COURT: I am sure the jury is aware of that.

MR. AUSLANDER: From the tenor of Mr. Testa's question, it seems he is trying to get a distance of the line.

THE COURT: Let's make it very clear. You were walking, as I see the diagram, with the hatch coaming to your left?

THE WITNESS: Right.

THE COURT: As you walked, how far to your left was the hatch coaming?

THE WITNESS: As far as I could make out -- I don't know if there was a passageway there but I went

through something there; like the back of the ship, I don't know if it was the side of the hatch or a little passageway there, I can't recollect. I know I walked to the other side.

THE COURT: As you walked around, how far in feet, if you can tell us, was the hatch coaming where you were walking?

THE WITNESS: I couldn't tell you.

MR. STEARNS: Your Honor, this question was asked and answered. He said one foot.

THE WITNESS: I said I don't know how much.

MR. STEARNS: You said one foot.

MR. AUSLANDER: Your Honor --

THE COURT: Yes, you will have a right to inquire. Mr. Testa is examining the witness.

Q This line represents the path you took behind the No. 4 hatch..

A Right.

Q And that is the line you drew?

A Right.

Q There is no question about it, this is Mr. Auslander's line and it is your line?

MR. AUSLANDER: Your Honor, obviously Mr. Testa is talking about scale here, my line, his line.

rka79 Bernardini-cross

It was drawn just to show general directions.

THE COURT: Mr. Auslander, there is no scale on this chart and I will charge the jury should take judicial notice of this fact that this chart which you drew represents no scale. It was put to make it easier for us to visualize the scene as it appeared on the day of the accident.

BY MR. TESTA:

Q Mr. Bernardini, then you continued the line around this way and made the X here and that concluded your voyage around the hatch, is that right?

A Yes.

Q As you were walking behind this hatch, even though you can't tell us the distance, could you put your hand out and touch the after end of the hatch?

A I couldn't recommend that.

Q You couldn't recommend that?

A I couldn't recollect that what happened. All I know is I walked from one side to the other side.

Q Did you make this "Y" here?

A Right.

Q Did you make the "X"?

A Yes.

Q Did you make this little zero?

A Yes.

Q The rest of it is Mr. Auslander's handiwork, is that correct?

MR. AUSLANDER: Objection.

THE COURT: Yes. I think the question was objectionable as to form. I think there is something Mr. Stearns put on there as well so you have to rephrase your question.

MR. TESTA: I just wanted to establish the parts that the witness put on this.

Q Did you draw anything else other than these lines, the line around here, the Y, the X and the zero, did you put anything else on that blackboard?

A Where the mate was standing, probably.

Q Did you put the "M" there?

A Somebody put it there.

Q I only want to know the things you put on it. Is that everything?

A Yes.

Q How tall would you say the man was that told you where the ladder was or was supposed to have been?

A I can't tell. He was smaller than me.

Q Was there a gangway man there?

A When I went up the first time I didn't see one.

Q The only other man you saw was this man that was smaller than you and the mate, is that right?

A To my eye, yes.

Q How tall was the mate?

A Average.

Q Can you describe him?

A He had his work clothes on. He was built like me, roughly.

Q Heavy man, a thin man?

A I don't know. I am a little heavy. Built like me.

MR. TESTA: No further questions.

MR. AUSLANDER: I would like to read a portion of the transcript that was not read by Mr. Stearns on page 36, starting at line 5:

"Q You were walking more toward the hatch than to the ship's side, right?

"A Yes.

"Q And you walked how many feet before you slipped?

"A On the inshore side.

"Q As you started to go forward on the inshore side?

"A About 10 feet, maybe."

rka82 Bernardini-redirect

REDIRECT EXAMINATION

BY MR. AUSLANDER:

Q When you spoke to the timekeeper he asked you what happened, is that right?

A Right.

Q Did he ask you how it happened?

A No.

Q He just asked you what happened?

A Right.

Q He didn't ask you, did he, for the details of all that happened to you?

A No.

Q When you spoke to the doctor did he ask you what happened?

A What happened.

Q Did he ask you how it happened or all the details?

A No.

Q Did you answer all the questions to the best of your ability that were asked of you by Mr. Stearns during this deposition?

A Yes, as far as I recollect.

Q Is it true about two weeks ago I sent this to you?

A To read up on it.

Q And asked you to read it?

A To read it.

Q And refresh your memory?

A Refresh my memory for the trial.

Q You say you are married?

A Yes.

Q And you have two children?

A Yes.

MR. TESTA: Objection.

THE COURT: You went into this on direct. I permitted you to do so. I don't recall that either of the counsel inquired about this.

MR. AUSLANDER: Preparatory to my next question.

THE COURT: You don't have to prepare for a question by asking those you have already asked.

You may proceed.

Q Mr. Bernardini, in response to Mr. Testa's question you said you were forced to go to work.

A Yes.

Q What did you mean by you were forced to go to work?

A I have two children.

rka84 Bernardini-redirect

MR. TESTA: Objection.

THE COURT: He answered the question. I think the jury can call on its own common experience in matters of this type.

Q In the 20 or 25 years your have worked on ships did you ever see pallets arranged from the coaming to the rail crossing over?

A No.

MR. TESTA: Objection. This has been gone over once and I made this objection that this man is not qualified to give expert testimony. He is not making any claim against the stevedore in this case and this is an improper line of questioning on redirect examination.

THE COURT: I heard an answer given before you rose and if there is an answer in the record I will leave it there.

Next time again, Mr. Bernardini, if you see any of the counsel rising to make an objection, whether it be your own counsel or one of the other counsel, just wait a moment so I can rule properly.

You may proceed.

MR. AUSLANDER: I would like to pursue this line of questioning.

THE COURT: Ask your next question.

Q In your experience, when there was a high coaming around the hatch what type of setup have you seen as far as pallets or platforms or anything of that nature?

MR. TESTA: Again I am going to object. This is improper redirect examination.

THE COURT: The subject was adverted to on cross examination by one or the other of you and because of that fact, because of the man's 25 years in the industry and because of another number of factors, I will overrule the objection if he can answer it.

Q You can answer.

A Usually they put up a platform on each side of the ship, one by the coaming and one by the hatch, and leave a passageway for people to walk through.

Q How big is this platform?

A It varies.

MR. TESTA: What difference does it make?

THE COURT: Obviously it varies. You will have different ships of different dimensions.

Q This diagram and the lines that were drawn, were these lines drawn just to show the general way you were walking?

MR. STEARNS: Objection. Leading.

MR. TESTA: Yes.

THE COURT: Yes. I think he is leading, and that is exactly why they were drawn, to give a graphic indication to the jury what had happened as though we were looking down on this deck from a helicopter, from a seagull, anything you might discuss. This is why it is up there and I charge that that is the reason it is there.

There are no dimensions listed, no measurements taken. This was obviously done in your presence, not separate and apart by an engineer with a ruler and various calibrating devices.

MR. AUSLANDER: That is all.

RECROSS EXAMINATION

BY MR. STEARNS:

Q Mr. Bernardini, when I was examining you yesterday did you or did you not tell me when you turned this corner, and I am referring to the offshore after corner of the hatch, you were within one foot of the coaming?

A All I know is --

Q Mr. Bernardini, did you tell me that yesterday?

rka87 Bernardini-recross

MR. AUSLANDER: I will object to that, your Honor, because of the form of the question.

MR. STEARNS: I apologize for the raised voice.

MR. AUSLANDER: Besides that, the form of the question. It is like did you stop beating your wife.

THE COURT: If he said it yesterday you can use it. It seems to me under the circumstances it is in the record.

MR. STEARNS: I want to establish that he did say it yesterday for the purpose of reminding the jury.

THE COURT: Without speeches, I will permit you the one question.

BY MR. STEARNS:

Q Did you tell me yesterday when you rounded this corner, the after offshore corner, you were one foot?

A On that side.

Q So you were one foot from the after corner and you were that far away all the way down?

A I don't know how many feet.

Q Didn't you tell me yesterday it was one foot?

rka88 Bernardini-recross

MR. AUSLANDER: Objection. Asked and answered.

MR. STEARNS: I will withdraw it.

Q Mr. Bernardini, you did not see anybody lay down these pallets?

A No.

Q Based on your experience in 25 years have you seen longshoremen laying down pallets?

MR. TESTA: Objection.

THE COURT: Sustained.

Q You claim that a platform should have been built against the coaming, is that right?

MR. TESTA: I will object to that, what his claims are.

MR. STEARNS: I am entitled to investigate what his claims are.

MR. AUSLANDER: He didn't say a claim. He said what he had seen.

THE COURT: I think what we are after is what would the accepted practice be and I will sustain an objection only as to form.

BY MR. STEARNS:

Q Mr. Bernardini, you are not a deck man?

A No.

Q You are not an expert on deck practices?

A No.

Q You have never worked on deck in your life?

A No.

Q When you are working on deck you are not in a position to see what the gangway man is doing -- when you are working in the hold, rather; you can't follow his every move, can you?

A No.

Q You are not an expert on what a gangway man should do in order to do his job?

A I am down the waterfront 25 years.

Q Are you an expert, Mr. Bernardini, never having worked as a gangway man, what a gangway man ought to do to do his job right?

A Right.

Q And you know the gangway man puts down these pallets, isn't that so?

MR. TESTA: Objection. I don't know whether he knows it or not.

THE COURT: Do you know the practice along the waterfront as to who does what?

THE WITNESS: Usually the man --

THE COURT: Do you know the practice, yes or

no?

THE WITNESS: Yes.

THE COURT: Do you know what the practice is along the waterfront for the installation of platforms?

THE WITNESS: Yes.

THE COURT: What is the normal practice?

THE WITNESS: Usually they leave a passageway.

THE COURT: Who does it?

THE WITNESS: The men on deck usually do it. They give the signals.

BY MR. STEARNS:

Q That is the member of the gang that works on deck or the gangway man?

A Yes.

Q And he is a member of your gang and is an employee of ITO, if ITO happens to be the stevedore?

A The employees are supposed to do it.

Q The employees of ITO?

MR. TESTA: Objection.

THE COURT: I don't think there is any testimony in that regard. If you want to ask about general practice you can, but in this case I will sustain

the objection as to form.

Q The gangway man is a member of your gang?

A Yes.

Q He works for the same stevedoring company as you, isn't that right?

A Yes.

Q And based on what you know, the gangway man, if he wants to build a platform or walkway on deck, he does so?

MR. TESTA: Again I will object. We are only talking about normal custom and practice, not what happened in this case.

Q Normally does the gangway man take pallets, get them from the pier, if he feels he needs them, and put them on the deck?

MR. TESTA: Objection. Now we are going far afield. This man is a hold man and I am sure he doesn't even know.

THE COURT: He has indicated to me that he knows what the accepted practice is. If he does know, I would like him to say what it is. How are these platforms constructed and by whom are they constructed as a normal practice.

THE WITNESS: Usually they put something there

so you could see over in the hatch, more so to look in the hatch, because the side of the ship is low enough -- the inshore side is low enough but the railing, you have to put something there to look in the hatch. Usually they put it right by the coaming, the railing of the hatch.

THE COURT: What is the practice as to what is put by the railing or the coaming?

THE WITNESS: Sometimes they put a small pallet so you could look right down, a block of wood or something. It all depends.

THE COURT: Do you know who in the normal practice does this?

THE WITNESS: The man that gives the signals. You get a small pallet and make a platform, but always leave a passageway so you could pass.

MR. TESTA: Objection.

THE COURT: I asked for the normal practice. The answer my stand.

MR. STEARNS: No further questions.

RECROSS EXAMINATION

BY MR. TESTA:

Q Mr. Bernardini, your 25 years in the waterfront you have worked in the hold, haven't you?

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A Yes.

Q You don't know anything about practices on deck, do you?

MR. AUSLANDER: Objection as to form.

THE COURT: If you rephrase the question I will permit the inquiry.

Q Did you ever work on deck in your whole time?

A When we have to put cargo on deck we all put cargo on deck. When we put drums on deck --

Q You are a hold man?

MR.AUSLANDER: He gave an answer.

Q You say you are a hold man?

A Right.

Q And your entire career as a longshoreman have you been a hold man?

A Right.

Q Where does a hold man work on the ship?

A Down in the hold.

Q The hold man does not work on deck?

A When we put cargo on deck --

Q Wouldyou please answer my question.

THE COURT: He is answering the question.

MR. AUSLANDER: You don't like the answer?

THE COURT: You say you normally work in the

hold. Do you ever work outside the hold?

THE WITNESS: Yes, when we put cargo on deck.

BY MR. TESTA:

Q Don't the deck men do that?

A We work on deck. We put the cargo on deck.

Q I asked you a question. Don't the deck men work on deck when you have cargo that is put on deck?

A The hold men work. We come on deck and take the cargo off the pallet.

Q Listen to me. When you are loading a ship --

A On deck?

Q Not on deck. When you are loading a ship you start loading the hold first?

A Right.

Q You don't start from the top and work down?

A Sometimes when there is cargo on deck.

Q The first thing you do is put cargo in the hold?

A Right.

Q Then you work up to the deck?

A Right.

Q You are a hold man so you work in a hold?

A True.

Q You are not an expert on deck practices, are you?

MR. AUSLANDER: Objected to.

THE COURT: Sustained.

Q How many times have you worked on deck in all your years as a longshoreman?

A What do you mean, rigging up or working on deck?

Q Working on deck.

A A lot of times.

Q How many?

A Whenever we had to put cargo on deck.

Q How many times, is that?

A Twenty-five years, it's a lot of times. Once a week sometimes. Once a week at least.

Q Don't you work 99 per cent of the time in the hold as a hold man?

A Right.

Q That is why they have different departments; they have a winch man who operates a winch, they have deck men that work on deck, they have dock men that work on docks, and hold men that work in holds?

A Right.

Q You as a hold man worked in the hold of the

ship?

A And we work on deck.

Q Didn't you say in your examination before trial that you never saw anything like that in your 25 years as a hold man, didn't you say that?

A Right.

Q Now you are going to hold yourself out as an expert as to how it should have been done?

MR. AUSLANDER: He said he never saw it across all the way.

THE COURT: Is there an objection?

MR. AUSLANDER: Yes.

THE COURT: Sustained.

MR. STEARNS: I object to that comment, which I don't think is a fair one.

THE COURT: The jury will disregard all of the most immediate comments. The only things the jury will accept is the testimony of the witnesses, the exhibits which were put into evidence.

MR. TESTA: No other questions.

MR. AUSLANDER: One or two more questions.

THE COURT: You are now up to re-redirect. You may proceed.

REDIRECT EXAMINATION

BY MR. AUSLANDER:

Q How many men are part of the deck gang on the ship?

A Only three.

Q And if cargo was being loaded on the deck, is it true that the hold men will come up and do that?

A Yes.

Q And is it usual that cargo is placed on deck?

A Many a times.

Q Containers, other things of that nature?

A Right.

MR. TESTA: I object to the leading questions, your Honor.

THE COURT: Do you have any more questions?

MR. AUSLANDER: No, your Honor.

THE COURT: The answers are in. I will allow it.

MR. STEARNS: May I ask one more question?

THE COURT: You may.

RECROSS EXAMINATION

BY MR. STEARNS:

Q You say you slipped on grease and you came in contact with the pallets?

A Excuse me. I didn't hear you?

MR. STEARNS: Two questions, your Honor.

Q Mr. Bernardini, you say you slipped on grease and then you came into contact with the pallet and you tripped on the pallet?

A I fell on the pallet.

Q Did you trip on the pallet?

A I fell on the pallet.

Q Did you say at any time during this trial that you tripped on the pallet?

A I don't recommend -- I don't recollect.

THE COURT: Thank you, Mr. Bernardini. You may step down.

(Witness excused.)

THE COURT: Mr. Auslander?

MR. AUSLANDER: May we approach the side bar?

THE COURT: Yes, indeed.

(At the side bar.)

MR. TESTA: If we are going to have any discussion I would prefer we have it in chambers.

THE COURT: Let's get on with it.

MR. AUSLANDER: The plaintiff is going to rest and I ask that the court take judicial notice of

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the Safety in Harbor Regulations for Longshoremen promulgated in May of 1969 which would cover this date, and specifically Section 1504.91, subdivision (a) and subdivision (c).

MR. STEARNS: On behalf of the shipowner, these are the safety and health regulations for longshoremen, and it has been held uniformly in this circuit not to apply to a shipowner and not to be proper matter for judicial notice in an action of a plaintiff against a shipowner.

However, by the same token, it is matter for judicial notice in a shipowner's action against the stevedore because they apply to the stevedore, and this is the way the safety regulations have been handled by courts in this circuit.

MR. TESTA: I would join in the first part of that objection and agree with Mr. Stearns that it has no bearing in so far as the plaintiff's case against the shipowner is concerned.

As far as the second party is concerned, of course, there is a portion that indicates that it is not the intent of the regulations to relieve the shipowner of any other regulations and I would call the court's attention to 1404.2,subdivision (b), in connection with any

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judicial notice in so far as the third-party action is concerned.

MR. AUSLANDER: Might I say, your Honor, in answer to Mr. Stearns and Testa, although I don't have the citations with me, at the luncheon break I will get you the citations which state that these are sections which can be used in the plaintiff's case as far as negligence and unseaworthiness aspects are concerned, and I will bring those to your attention. I will also give the citations to counsel.

THE COURT: Let me suggest at this point that the court will take judicial notice of the various sections referred to by each of you gentlemen. Prior to my charging the jury I will indicate to you the manner in which I will charge on these particular matters, but at this point he is asking me to take judicial notice of certain sections and I am prepared to take judicial notice of all sections adverted to by any of the counsel.

MR. TESTA: Will we have an opportunity to be heard on the record with respect to this.

THE COURT: Yes. I do not plan to instruct the jury in this regard at this time.

Forpurposes of completeness in his case, I have indicated to you now I am taking judicial notice of

these sections so that prior to his resting he will have at least completed his presentation. I do not plan to discuss the matter with the jury at this time.

MR. STEARNS: If I may just say this. I assume what the court says, there has been an acknowledgement for the purpose of completeness of the offer of proof and the question or relevancy and therefore the admissibility of what has been asked is held in abeyance?

THE COURT: No, I plan to charge the jury on this, but I will indicate prior to your summations the manner in which I expect to charge.

ME. TESTA: At that time we will have an opportunity to be heard on the record.

THE COURT: Yes, because I will rule on your requests to charge and at that time, as I have done in the past, I will indicate the substance of my charge.

MR. TESTA: So we don't have to be heard at this time in connection with that.

MR. AUSLANDER: At this time I don't have the actuarial table but I will have that, again, at the luncheon break and I will ask the court to take judicial notice of the man's life expectancy. I will provide the court with the actuarial table from the Civil Practice

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Law and Rules of the State of New York, which is the normal table used by the courts, and if you have any other I will not object to using that table.

MR. STEARNS: I would object to that offer of evidence on the ground there is no proof of permanent injury in this case.

THE COURT: There is proof in the record of this. I would suggest on this, this is a matter, as far as the time period is concerned, if counsel will consult the various tables and agree on one or the other table, I will accept their agreement on this, but I would suggest there is testimony, Mr. Stearns. It may be you wish to dispute it, as to permanence, and therefore I would expect the life expectancy is relevant.

I would suggest further, if counsel cannot agree on a particular table, I will accept one of the so-called official tables.

MR. TESTA: Work expectancy we should be talking about and not life expectancy.

MR. AUSLANDER: Life expectancy if a man has a permanent injury.

MR. STEARNS: The only testimony of pain I understand is when he works.

MR. AUSLANDER: When the weather changes.

rkal03

MR. TESTA: There is the Cunningham case that the most a longshoreman is expected to work is age 65.

MR. AUSLANDER: I will concede that.

THE COURT: Actually I would suggest from your point of view this may be the manner in which you want to handle this because you are talking essentially about a claim, a loss of earnings for intermittent days off, looking towards the future, and he made this point when he was loading sacks of coffee and unloading sacks of coffee so it does come within the general ambit of work expectancy, and if you gentlemen could agree, could stipulate, that the work expectancy of a longshoreman is to age 65 it would seem to me that would cover matters.

MR. TESTA: I think so.

MR. AUSLANDER: I don't have the medical bills that were paid so I will give those figures and we could agree these were the reasonable value of the medical services.

MR. TESTA: I will take my file and will state we have bills in whatever my file reflects, but Dr. Tagliagambe will testify in this case as to the reasonableness.

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MR. STEARNS: The shipowner will not stipulate to reasonableness of fees. In addition to moving against plaintiff's case for negligence and unseaworthiness --

THE COURT: Why don't we wait until the plaintiff is finished.

MR. AUSLANDER: I rest.

THE COURT: Now I will hear the motion.

MR. TESTA: I think this should be done outside the presence of the jury.

THE COURT: It is outside the presence of the jury.

MR. TESTA: They are sitting in the courtroom.

THE COURT: And we are at the side bar conversing in a low, quiet tone of voice. If I thought the matter was being heard by the jury I would promptly adjourn to the robing room, but I find these protracted side bar conferences, protracted robing room conferences, to be an annoyance to jurors, it takes away from their concentration and I don't think it serves the interest of justice.

Let us hear from you now out of the presence of the jury. I am listening.

MR. STEARNS: The defendant moves at this

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time for judgment dismissing the complaint on the grounds that plaintiff has not established a prima facie case for either unseaworthiness or negligence. Particularly in this case, it is a particularly apt motion because the sole testimony of the occurrence of this accident has come from plaintiff and plaintiff has given an extremely garbled, extremely vague and extremely contradictory description of how this alleged accident happened.

Apparently there was a claim initially that the man slipped and tripped. I think the man as much as admitted in response to the last question on cross examination that he had not tripped. In view of the contradictions in the man's testimony there is no basis, based only on his testimony, for this case to proceed.

MR. TESTA: I would like to join in the shipowner's motion for a directed verdict in favor of the defendant and to join in the motion to dismiss the complaint forst if all as to negligence. There is no proof of notice in this case to the defendant shipowner of the presence of oil and grease on the deck. The plaintiff testified that he came aboard the ship at 8:45, that the accident happened some five minutes later, at 8:50, and during the time he walked around the hatch he did not

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see the oil and grease at any time before the accident happened, and because of the cracking sound from the boom he was looking up. There is nothing in this record that would indicate notice, and notice is a prerequisite to a cause of action based on negligence.

For that reason I say that the negligence count should be dismissed.

As far as unseaworthiness is concerned, there is no testimony in this record of any defective condition. There is no testimony that there was anything unsafe or dangerous or defective about this pallet arrangement here, and lacking testimony that this condition wasn't in any way defective or unsafe or improper in some way, you have a failure of proof on the question of unseaworthiness. I say all counts should be dismissed; on negligence, failure for proof of notice and the unseaworthiness count, failure to prove the defective condition.

MR. AUSLANDER: First of all, the presence of the grease there makes the vessel unseaworthy if the jury believes it.

The presence of the pallets across the whole deck without leaving a passageway makes the vessel unseaworthy.

rkal07

The setup in that posture with the mate there obviously looking at the man seeing what was going on, at least that is what the testimony is so far, would indicate that the mate knew or should have known that this was a condition which was improper. The regulations state that there have to be an unencumbered walkway.

MR. TESTA: What regulation says that?

MR. AUSLANDER: It shall be kept clear --

MR. TESTA: The key word is "loose."

MR. AUSLANDER: That is your interpretation. That he also said that the normal practice is to have a walkway. There was no such walkway. It was covering the whole deck area. The fact that the mate was on the scene, by inference the jury can infer he was overseeing what was going on. That is his job on the ship. He is a mate, he is an officer, that he would have taken notice or should have taken notice there was some condition there that should have been cleared up, and, as a matter of fact, in defendant's case he is going to claim there was no accident. It can just as well be argued that he is doing that to protect himself because he saw a condition which he knew was improper and it would just put the blame on his shoulders. You could use the same type of argument, but he was there,

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he had him placed right there. He saw the condition and he did nothing to rectify it, at least as far as the case stands.

MR. STEARNS: There is no such testimony.

MR. TESTA: May I say one other thing. I want to say if Mr. Auslander is now saying that the jury can draw inferences from the fact that a mate was there, then a defective condition must have existed but a jury can't draw an inference unless it is based on some factual testimony.

MR. AUSLANDER: He testified as to the grease and the obstruction.

MR. TESTA: But you said because the mate was there he should have known about it.

MR. AUSLANDER: Yes.

THE COURT: Although I did not agree with all that has just been said by counsel for plaintiff, I do believe that the testimony which was to the effect that a number of grease and oil spots were present on the deck in an area which would normally be utilized by members of the ship's crew and longshoremen would lead at this point to the court's denying the motions to dismiss at the end of the plaintiff's case.

I recollect that the case is not one that would

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be characterized as a strong one, but there is testimony the plaintiff saw the grease spots, they did exist, and there were several heel marks in those grease spots which could be taken to indicate the grease spots had been there for more than a few moments.

There is no much more in the record at this point but I think in light of the record as it exists now, the plaintiff has made out a prima facie case for both negligence and unseaworthiness.

It may well be that after I hear the defendant and the third-party defendant's proof that I may be differently disposed toward a motion in connection with one or the other of these claims, that is, unseaworthiness or negligence, so I am going to deny the motions at this time.

You, of course, are free to renew them at the end of the entire case and I will consider the matter again at that time.

Motion denied. You have your exceptions.

(In open court.)

MR. STEARNS: Your Honor, at this time I would like to call Mr. Stahl on behalf of the defendant.

THE COURT: Ladies and gentlemen, the

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plaintiff rests.

Is that correct?

MR. AUSLANDER: Yes.

THE COURT: At this time plaintiff has completed the presentation of his portion of the case. We will now proceed to hear from the defense. Mr. Stearns has just called his first witness and if you would swear the witness we will proceed.

R U N E S T A H L, called as a witness by defendant and third-party plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STEARNS:

Q Captain Stahl, I would ask you to keep your voice up because it is some distance from where you are to over here.

English is not your native language?

A That's right.

Q If I ask you a question or, for that matter, if Mr. Testa or Mr. Auslander ask you a question you don't understand, don't attempt to answer it; just simply say so.

Mr. Stahl, were you the chief officer on the Svensksund on October 28, 1969?

rkalll Stahl-direct

A Yes.

Q Are you presently employed? Are you working now?

A No. I signed off the vessel last Saturday to go home on vacation.

Q What was the name of the vessel?

A Husaro. A Swedish flag cargo vessel.

Q Who owns the Husaro?

A Salem Shipping Company, Sweden.

Q Does the same company that owns the Husaro own or did they own the Svensksund?

A No.

Q Who owned the Svensksund?

A Svea Lines.

Q How long were you employed by Svea?

A I was employed by Svea 16 years.

Q What years were they?

A '55 to '72. It would be 17 years. Excuse me.

Q Since 1972 have you worked for Svea at all?

A No.

Q Do you have any intentions of working for Svea?

A Not any more. They don't have any cargo vessels.

Q Are you saying the Svea company no longer has cargo vessels?

A No.

Q So it is not possible for you to work for Svea --

MR. STEARNS: I will withdraw the question.

Q The present employers, the owners of the Husaro, are an entirely different company?

A Yes.

Q Did I ask you to come here to testify in court?

A Yes.

Q And you are on your vacation?

A Just now I am on vacation.

Q When did your vacation begin?

A Last Saturday.

THE COURT: If you could move to the next point I would appreciate it. We have heard this.

Q You are familiar, are you not, Captain, with the arrangement of the ship the Svensksund as it was in October of 1969?

A Yes.

MR. STEARNS: I would ask that the court mark this plan as Defendant's Exhibit A.

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THE COURT: You have an A and a B for identification, some report of Dr. Graubard, so this would be C for identification.

(Defendant's Exhibit C was marked for identification.)

BY mr. stearns;

Q Captain, showing you Defendant's Exhibit C, I ask you what this plan is.

A It is a general plan of the cargo vessel Svensksund.

MR. STEARNS: I offer this in evidence.

THE COURT: Show it to counsel.

MR. AUSLANDER: No objection.

MR. TESTA: No objection.

THE COURT: What do you call it?

MR. STEARNS: General arrangement plan.

(Defendant's Exhibit C was received in evidence.)

Q Captain, how many hatches did the Svensksund have?

A Four hatches.

Q How many of these hatches were forward of the midship house?

A Three in the forward end of the midship house

and one in the after end.

THE COURT: Captain, I know it is not easy to testify in another language than your native language, but would you try to keep your voice up so the jurors can hear everything you say. I know I am having difficulty in hearing and understanding you and I am sure the jurors are as well.

THE WITNESS: Yes, sir.

BY MR. STEARNS:

Q How many hatches were forward of the midship house and how many after?

A Three hatches forward end, one hatch after end.

Q The No. 4 hatch was the only hatch aft the midship house?

A That is right.

Q At this time I show you, Mr. Stahl, a number of photographs, seven in number, and ask whether or not you can identify them.

A The first photograph is taken of No. 4 hatch from the port side showing the recess for the hatch cover.

Q Captain, I ask you to look through all of these pictures and tell us whether all of them are pictures of

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the Svensksund, the No. 4 hatch of the Svensksund, as it appeared on October 28, 1969, the general arrangement as it appeared in 1969.

A Yes, all of these photographs show the arrangement of the No. 4 hatch on the Svensksund.

MR. STEARNS: If counsel will stipulate, we can have her mark it just as D; then I will mark a number, 1, 2, 3, 4, 5, 6, on the back.

THE COURT: Do you want them as D1 through 6?

MR. STEARNS: Yes.

THE COURT: Mark them in the first instance. If there are objections, fine. If there are none, we will proceed and identify them when they are admitted.

(Defendant's Exhibits D1 through D7 were marked for identification.)

MR. AUSLANDER: May I have a voir dire on this?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. AUSLANDER:

Q Do you know when these photographs were taken?

A No.

Q Do you have any idea?

A I think they must be after when I was signing

When would that be?

A After December, 1969.

Q Where were they taken?

A I don't know, I can't answer.

Q Were you present when they were taken?

MR. STEARNS: This is totally irrelevant. He said he could identify what the pictures show, that they show his No. 4 hatch of the Svensksund as it appeared on October 28, 1969.

THE COURT: If that is an objection, the objection is overruled.

You may proceed.

MR. AUSLANDER: No objection.

(Defendant's Exhibits D1 through D7 were received in evidence.)

MR. TESTA: If your Honor please, may I ask they be shown to the jury at this time.

THE COURT: That is counsel's prerogative. He will show them when he wants to.

Needless to say, ladies and gentlemen of the jury, if counsel should not want to show you a particular exhibit, when you are in the jury room if you wish

to see any exhibit marked in evidence at the trial, such as these particular photographs, you need only call for the exhibits and counsel will arrange for them to be sent in to you so you could study them at your leisure in the jury room.

BY MR. STEARNS:

Q Captain Stahl, referring to Defendant's Exhibit D1 in evidence, can you tell me what view of the No. 4 hatch that is?

A This is the front of view of the No. 4 hatch taken from the port side over to the starboard.

Q Is that a view of the front of the No. 4 hatch between the forward coaming and the midship house looking from port to starboard?

A Yes.

Q Is that a view, referring to the diagram we have drawn, taken from here looking across the ship to there, assuming that this diagram represents the after end of the ship with the pier on the right-hand side, the ship being tied up port side to.

THE COURT: Indicating the photograph would have been taken from the offshore side pointing to the inshore side.

A Right.

Q So it would be, would it not, the area between the forward coaming and the after end of the midship house?

A That is right.

MR. STEARNS: I would like to show that photograph to the jury, your Honor.

(Pause.)

Q Captain, again showing you Defendant's Exhibit D1, what is this box-type effect with the open lid which is marked by an X, what is that?

A It's the entrance to the No. 4 hatch.

Q Is that the so-called escape hatch ladder?

A Yes.

MR. AUSLANDER: I will object to that. It is certainly leading. He may have said it was an air transfer vent.

THE COURT: I would appreciate your not leading your own witness.

MR. STEARNS: Could I have my question read back so I could correct it.

THE COURT: No. The answer is in the record.

Q Can you tell me what you refer to as the entrance to the No. 4 hatch, what is commonly called in

New York an escape hatch?

MR. AUSLANDER: Objection.

THE COURT: Overruled.

A This is an entrance to a ladder going down into the hatch.

Q You don't know what they would call it in New York?

A I heard it just now.

Q Is this the ladder that members of the longshore gang would use to go to work if they were hold men and were to work in the hold?

A Yes.

Q Is this the only ladder giving them access to the hold of the No. 4 hatch of the Svensksund?

A Yes.

Q Captain Stahl, if you would please, to come over to this blackboard and I would ask you to draw in on the blackboard where exactly this ladder is, as best you can, and before that, just to make sure you understand, Captain, this is the inshore starboard side of the ship, this is the outline of the hatch coaming, and this is the after bulkhead of the midship house.

MR. STEARNS: The captain has drawn a box against the wall of the midship house, on the inshore

side, and has indicated the box by an X.

THE COURT: Captain, am I correct that that X would be in a place which would be forward of the No. 4 hatch?

THE WITNESS: Forward of the No. 4 hatch, yes.

BY MR. STEARNS:

Q Captain, showing you Defendant's Exhibit D2, tell us what view of the No. 4 hatch that shows.

THE COURT: Would you read the question back.

(Question read.)

A It shows a view of the No. 4 hatch taken from the poop and showing forward.

MR. STEARNS: I would ask the jury be permitted to see this.

MR. AUSLANDER: I didn't hear the captain's answer.

(Answer read.)

Q Captain, on this photograph, before I show it to the jury, again appears the same structure as appeared on D1, again the lid has been marked with an X. Again, will you tell us what that is?

A That is the escape ladder, No. 4 hatch.

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Q The same one which was shown in Defendant's D2, is that correct?

A D1.

Q Captain, referring to Defendant's Exhibit C, which is the capacity plan, I would ask you to indicate in red pencil, which I am going to hand you, and you could do it by drawing a circle, where the poop is on this plan.

(Witness indicates.)

Q What is the poop deck?

A That is the after end of the vessel.

MR. STEARNS: With the court's permission, can I now show the jury Exhibit D2?

THE COURT: I would suggest after the jury has looked at these two exhibits we will take our luncheon recess.

Q This Defendant's Exhibit D2, Captain, is this the view of the No. 4 hatch taken from the after end and looking in a forward direction?

A Yes.

Q That would be taken from here looking in that direction?

A Yes, that is right.

THE COURT: Indicating on the diagram a photograph taken from the after end of the ship looking

forward.

MR. STEARNS: That is all I have of these two exhibits.

THE COURT: We will suspend at this time, ladies and gentlemen.

May I again caution you not to discuss the case or remain within the hearing of anyone else discussing the case. Keep an open mind. We will resume here as close to 2:30 as possible.

I have this one matter which I will take up here at 2:15 which should take no more than 15 minutes. If it runs a few moments longer I will ask your indulgence.

(Luncheon recess.)

AFTERNOON SESSION

(3:00 p.m.)

(In open court; jury present.)

R U N E S T A H L resumed.

THE COURT: Ladies and gentlemen, the matter I had told you about took a little longer than I mentioned previously.

We will now resume with the direct examination of Mr. Stahl, who was on the stand just before you went to lunch.

You may proceed, Mr. Stearns.

DIRECT EXAMINATION CONTINUED

BY MR. STEARNS:

Q I show you Defendant's Exhibit 3, Captain, D3 in evidence, and ask you if you can tell me what that shows, what view of the No. 4 hatch is that?

A It shows hatch No. 4 taken from the poop forward.

Q It is a similar picture to that shown in picture No. 2?

A It is the same picture but taken from different places.

Q Does it appear that 3 was taken from higher up?

A Yes.

Q On the poop deck?

A Yes.

Q The poop deck, of course, is in the after end of the ship?

A That is right.

Q Captain, No. 4, Defendant's Exhibit D4 in evidence, can you tell me what view of the ship that shows?

A That shows the after end of hatch No. 4, indicating the recess for the hatch cover taken from the port side to the starboard side.

THE COURT: I would now have the court reporter read the last answer because I had difficulty also but I wanted it to be finished before going ahead with it.

(Record read.)

Q Captain, would you speak slowly and as distinctly as possible so the members of the jury can hear everything you have to say.

A Yes.

Q Captain, looking again at Defendant's Exhibit D4, where on this diagram was that picture taken and in what direction was the cameraman facing?

A It was taken from the offshore side to the inshore side, the offshore position to the inshore position. It was taken from a place over here to here (indicating).

Q Does that picture show a view of the hatch looking along the after coaming?

A Yes.

Q Does the after coaming of the No. 4 hatch appear in this picture?

A Yes.

Q Would you circle the after coaming of the No. 4 hatch that appears in this picture with this pen and ink?

MR. STEARNS: With your permission, may I show it to the jury?

THE COURT: Yes, indeed.

(Pause.)

MR. STEARNS: I also hand Defendant's Exhibit D3 starting at the other side of the jury box.

THE COURT: Why don't you do that. And, members of the jury, make sure you have seen both pictures.

(Pause.)

Q Captain, looking again, please, at Defendant's

Exhibit D4 and tell me whether or not it is physically possible to walk along the after coaming of the No. 4 hatch of the Svensksund from the offshore side to the inshore side?

A No.

Q What is in the way?

A There is a fence build-up for the landing for the hatch covers.

Q Face the jury and speak a little louder.

A There is a fence build-up for the landing for the hatch cover.

MR. TESTA: If your Honor please, could we have the reporter read that.

THE COURT: It has been stated twice.

Could you all hear the answer?

No, you didn't.

I will have the reporter read it.

(Answer read.)

Q Captain, would you indicate this fence again with red ink on this picture.

MR. STEARNS: May I show this picture to the jury?

THE COURT: You may.

(Pause.)

Q Captain, is there a wall or a fence as well on the other side, that is, the inshore or the starboard side?

A This fence is on both sides.

Q Captain, you testified that this space is an area where the hatch covers fold back into?

A Yes. There is a recess for the hatch covers.

Q What are the hatch covers, if you could explain that?

A The hatch covers is something you put over the hatches to protect them from rain or bad weather.

Q Is it a kind of cover for the hatch?

A It's a kind of cover over the hatch.

THE COURT: What is it made of, metal?

THE WITNESS: Metal. They are patent hatch covers.

Q I show you D5. What does that show?

A It shows the stowage of the hatch covers for hatch No. 4.

Q Does it show the stowage of the hatch covers in the space shown on Defendant's Exhibit 4?

A Yes.

Q If I understand you correctly, Defendant's Exhi-

bit 4 shows this area with the covers on the hatch and Defendant's Exhibit 5 shows them when they have been folded back into this space or recess, isn't that so?

A That is right.

Q Captain, do these covers fold back against the front bulkhead of the poop deck?

A Yes.

MR. STEARNS: May I show 4 and 5 for comparison to the jury at the same time?

THE COURT: Certainly.

(Pause.)

Q Referring to Defendant's Exhibit C, the general plan.

Captain, I ask you, one, to put a red line on this general plan indicating where these fences or restraining walls are at the No. 4 hatch.

I would also ask that you cross in with the cross hatching the area into which these covers fold back.

Turning to D6, what view of the Svensksund does that show?

A That shows the middle of the after end of hatch No. 4 taken from the port side, from the forward end to the after end.

THE COURT: Would you read the entire answer

back; perhaps the question and the answer.

(Record read.)

Q Will you indicate where the camerman was standing when this picture was taken and in which direction he was facing?

A The camerman was standing over here. He took the photo in this position over here and showing the picture of this area.

Q Does that picture show the hatch covers being folded back into the space we talked about before?

A Three hatch covers is folded in the space and one hatch cover is in place on the hatch.

Q Captain, is it physically possible to walk around this hatch to the offshore side around, make a left turn and walk one foot from the after hatch coaming; is that physically possible?

A No.

Q Because of the fence?

A Because of the fence, yes.

Q Which is a recess for the hatch covers?

A Yes.

Q Was the hatch open on the morning of October 28, 1969?

A Yes.

Q How high is the coaming around the No. 4 hatch?

A It's about three feet, three feet and a half.

Q Can a person of your height walk to the corner, the forward inshore corner of the hatch, and look over the coaming and see whether or not there is a ladder on any one of the four inside walls of the coaming?.

A Yes.

Q Were you on deck on the Svensksund on October 28, 1968 at approximately 10 minutes --

THE COURT: I think you mean 1969.

Q -- 1969 at approximately 10 minutes of 9?

A Yes.

Q Where were you standing? Were you in the vicinity of the No. 4 hatch at the time?

MR. AUSLANDER: I would ask that counsel just ask direct questions and not leading questions.

THE COURT: Yes, that is a leading question.

Can you tell us where you were standing at about 10 minutes of 9?

THE WITNESS: I was standing in the forward end of hatch No. 4 on the starboard side just close to a ladder going from the deck up to the staircase, going from the main deck up to the boat deck.

Q Is this boat deck on the midship house?

A Yes.

Q Can you show us approximately where you were standing at about 8:50 that morning, looking at D2?

A Over there.

MR. STEARNS: Your Honor, the witness has indicated this pen doesn't seem to write on photographs very well. He has drawn a circle which you can see clearly when you hold it so there is reflection, but looking at it straight on it is difficult to see.

Q Were you approached by Mr. Bernardini at that time?

A Yes.

Q Did he say something to you?

A He was asking if I was the hatch boss.

Q What did you tell him?

A I said no.

Q Was that the extent of your conversation at that time?

A Yes.

Q Where was Mr. Bernardini at the time this question was asked and answered?

A I don't understand.

Q Where was he at the time he came up to you and

asked you whether you were the hatch boss?

A He was coming from forward and on the starboard side, approaching No. 4 hatch.

Q Was he walking in the midship passageway?

A Yes.

Q Would that be the area from the gangway to the end of the midship house?

A Yes.

Q How far was it, approximately, from the head of the gangway to the after end of the midship house on this ship that day?

A Around 25 feet.

Q Did you see where Mr. Bernardini went after he asked you whether you were the hatch boss?

A He went over to the port side.

Q I will ask you whether on this diagram he would be going to the top of the diagram in that direction?

A Yes.

Q Did you see Mr. Bernardini again that morning?

A Yes.

Q About how long afterwards?

A A very short time. Between a half minute to a minute, not more.

Q At that time were you standing?

A I was standing on the same place.

Q Would you indicate, and I ask you, please, to come down and indicate on this diagram, where you were?

A Here.

Q You have indicated with a circle and an X.

At the time you saw Mr. Bernardini again where was he?

A He was coming from the after end of the starboard side, facing me.

Q Was he back on the inshore side?

A He was back on the inshore side.

Q Was he walking towards you, towards the right-hand of this diagram?

A Yes.

THE COURT: That is, he was walking forward?

THE WITNESS: He was walking forward.

Q What, if anything, did you see Mr. Bernardini do at that time?

A He was the only man on deck on the starboard side so I was watching him, and then he was coming around about the middle of the hatch. He stopped, looked around, got down on his knees on top of some pallets and with his face down and screaming.

Q Did Mr. Bernardini trip and fall down on the pallets?

A No.

MR. AUSLANDER: I will object to the form of the question.

THE COURT: He answered it already.

MR. STEARNS: Your Honor, I don't consider that leading.

MR. AUSLANDER: Well, the court does and let the court rule.

THE COURT: From this point on please don't lead.

MR. TESTA: I am wondering whether the preceding answer should be read to the jury in case there is a question about it.

THE COURT: No, let's proceed.

MR. STEARNS: I am trying to do this without any suggestion of leading.

BY MR. STEARNS:

Q Can you tell me whether or not you saw Mr. Bernardini trip or slip at any time while on the Svensksund on October 28, 1969?

MR. AUSLANDER: I object to the form of the question. It is leading and suggestive.

THE COURT: Overruled.

MR. AUSLANDER: It is the same question as before.

THE COURT: It isn't.

MR. STEARNS: Can I have the question read so the witness has it fresh in his mind?

A No.

Q Did you approach Mr. Bernardini after he laid down on the pallets?

A Yes, I approached him.

Q Did you go over and talk to him?

A Yes. I went over to him and asked him, "What is the matter?"

Q What did he say?

A He was claiming --

THE COURT: What did he say to you when you said, "What is the matter"?

THE WITNESS: He was claiming for an unsafe passage.

THE COURT: What did he say to you?

THE WITNESS: I can't say exactly the words he was saying word for word.

THE COURT: If you don't remember the words, that is all right. Tell me the substance of what he

said in general terms as best you can recall.

THE WITNESS: "I am claiming unsafe passage. I want to see somebody."

THE COURT: That is what he said in words or substance?

THE WITNESS: Yes.

BY MR. STEARNS:

Q Did he at that time tell you that he had slipped?

MR. AUSLANDER: Just a moment.

THE COURT: Did he say anything else?

THE WITNESS: He was only claiming for unsafe passage.

Q Was there any grease?

MR. AUSLANDER: I will object to that.

THE COURT: Sustained, and I would suggest you proceed to lay a proper foundation for your question.

MR. STEARNS: I will withdraw it, your Honor.

Q Can you tell me whether or not you prepared a statement after you saw this event on the deck?

A I prepared a statement after calling the shipowner's representative.

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Q Did they send somebody down to the ship?

A They sent a representative down to the ship.

Q When did you give the statement?

MR. AUSLANDER: I object to this. I am wondering whether this is proper direct examination?

THE COURT: It would seem doubtful to me that it is proper. At this point I will permit the answer to this question but I should suggest you prepare to object should counsel pursue it.

MR. AUSLANDER: I object to the question itself.

THE COURT: Overruled.

MR. STEARNS: Can I have this marked for identification?

(Defendant's Exhibit E marked for identification.)

Q Is this a copy of the statement you gave on the date this plaintiff says he had an accident?

A Yes.

MR. STEARNS: I offer it in evidence.

MR. AUSLANDER: Objected to.

THE COURT: Sustained.

MR. AUSLANDER: If your Honor please, I believe this is a grandstand play by defendant's counsel

when he knows perfectly well that things like this don't go in evidence.

THE COURT: I am not prepared to conclude that it is such an act. I would be surprised if it were and I will leave the matter as it is now.

The objection is sustained.

I would hope no one around here engages in what is called grandstand play.

MR. STEARNS: Your Honor, I would ask a question now to explain --

THE COURT: Askyour question.

BY MR. STEARNS:

Q Captain, tell me, did you discuss this case with anyone after October 28, 1969 until you talked to me some time this spring?

A When this accident happened --

MR. AUSLANDER: Just yes or no.

Q Can you answer it yes or no?

A Yes.

Q To whom did you talk?

A I have been talking with the superintendent of the pier, talking with the foreman in charge of the loading of the vessel, with the owner's representative.

Q Were all these conversations on the day

that Mr. Bernardini claimed he had his accident?

A Yes.

Q Apart from that day, October 28th, until I spoke to you in the spring, did you talk to anybody else?

A No.

Q Did I show you this statement when we discussed this case?

A Yes.

Q Did it refresh your recollection as to the events of October 28, 1969?

A Yes.

Q Captain, who placed the pallets on the deck between the coaming and the inshore rail on which the plaintiff laid out?

A It was placed by the stevedores to make a working gangway between the hatch coaming and the ship's side.

MR. AUSLANDER: May I have that answer, please.

(Answer read.)

THE COURT: Is that a working gangway or walking?

MR. AUSLANDER: Is that walking or working?

THE WITNESS: A gangway.

Q Was it something for the signalman to walk on as he went from the ship's rail to the coaming?

A Yes.

Q Have you seen similar arrangements of pallets not only only on the Svensksund but on any other ship you have been on?

A Several times in the United States.

Q Nothing unusual then to see pallets laid down by the stevedores to walk on?

MR. AUSLANDER: I will object to the form of the question.

THE COURT: Sustained.

Q Is there anything unusual about seeing them?

A No.

Q Who were the stevedores on October 28, 1969?

A I think there was ITO.

MR. STEARNS: No further questions.

THE COURT: We will take our recess at this point before we begin our cross examination of the captain.

I am going to enlighten the jurors relative to certain matters before you go into your recess.

We will be working perhaps something past 5 tonight -- 4:30 tonight. We may go a fair amount past

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4:30 tonight, but for you the good news is you will not be sitting tomorrow. We will not proceed with the trial tomorrow and we will resume the trial after we terminate tonight -- we will be getting very close to the end when we do resume -- we will resume Friday morning at 10 o'clock, so you can fortify yourselves in the next few minutes and anticipate staying beyond your usual leaving time tonight. As a matter of fact, there is telephone out there if anybody would like to make a call. And you may also now plan you will not be in tomorrow but we will resume at 10 o'clock on Friday.

We will take a 10-minute recess. Please keep an open mind and do not discuss the case among yourselves.

(Recess.)

(In the robing room.)

MR. AUSLANDER: If your Honor please, in respect to the last few moments of the direct testimony of the mate where Mr. Stearns attempted to introduce into evidence a statement signed by the mate taken on behalf of the defendant, I ask that you give instructions to the jury at this point that what was done was improper, that there is nothing to be held against the plaintiff because it looks as if I am trying to keep out something which

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obviously, hornbook law, you cannot put into evidence the statement of your own witness. At best it can be done on cross examination when you are trying to discredit him, but not as something that is cumulative or to substantiate the testimony that he made, and when I objected the first time and you let him proceed and then again he tried to get it in and had it marked and offered it, it looks very bad to the jury that I am trying to keep something out which on its face, and it is elementary, cannot get into evidence.

MR. STEARNS: May I say this. You can put anything in evidence you like as long as there is no objection.

THE COURT: I don't think that answers the question.

MR. STEARNS: The other point is, and this was covered by succeeding questions and here we have a situation where there is a lapse of some four years between an event and the man testifying. I think it was very important and legitimate entirely to point up to the jury that the man has used something to refresh his recollection.

Now, if I did not offer this statement in evidence, would not Mr. Auslander have been permitted in

summation to say they marked an exhibit, the man's statement given the same day, they never offered it in evidence.

THE COURT: I assure you Mr. Auslander would not make that statement, and I doubly assure you the court would have taken curative steps at that point. I am here to serve the function and the function is to try to preside on a trial which is fair.

I do feel that the attempt made to put in what must be a prior consistent statement from what I have seen, was certainly -- and let me use the word I used yesterday with Mr. Auslander -- an ill-advised gesture.

In view of Mr. Auslander's request I will make a very brief comment to the jury. The essence of it will be that they should disregard anything that has been said relative to a statement, a written statment, made by Mr. Stahl.

MR. AUSLANDER: Would you give the reasons why?

THE COURT: I will just indicate that after all matters of law are dealt with by me and I will take care of the matter in the way indicated. If I tell them to disregard it and erase it from their mind, I think you have sufficed. Sometimes you can make too much

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of an explanation in an attempt to do justice fairly and you can go the other way.

MR. AUSLANDER: Except this, your Honor: just telling them to disregard it doesn't do anything from a very pragmatic point of view, but if you tell them that it was not something that should or could be introduced in evidence on the defendant's own case, it would serve the purpose.

THE COURT: I would suggest that I have sustained the objection to its introduction. It is not in evidence. It has not been shown to nor read to the jury and I think the manner in which I propose to handle it is fair.

MR. AUSLANDER: It is as if I am trying to keep something out which I am hiding from them, which is not accurate, it doesn't belong in the first place. When I was making my objection it is as if I am hiding something from the jury, which as a situation in the interest of fairness is not something that they should get that impression.

THE COURT: Anything else?

MR. TESTA: No.

(In open court.)

THE COURT: Ladies and gentlemen of the jury,

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just before the last recess you heard some testimony about a written statement made by Mr. Stahl. The statement was mentioned and it was marked as an exhibit for identification. There was an objection made to it which I sustained. I sustained it for legal reasons which I believe to be quite proper.

Under the circumstances, I would ask that you ladies and gentlemen disregard any testimony of this witness as it related to that written statement. Just disregard it and wipe it from your minds. The reason I direct you in this regard is strictly as a matter of law which is within my province. The facts, of course, are your province. You shouldn't draw any inference from what I have said against Mr. Auslander, who made the objection which I sustained and which I believe was properly sustained, or against his client, Mr. Bernardini. The matter should be erased from your minds as though it had never been placed before you.

At this stage I have been advised by counsel that a doctor has come and therefore, since we have finished the testimony --

MR. STEARNS: He is not here now.

THE COURT: Then let's proceed. I thought Dr. Lodico was here.

We may interrupt again when either of the two doctors arrive.

MR. TESTA: Your Honor, may I state for the record with regard to the statement your Honor just made to the jury that it is not the testimony of this witness, it is the statement itself or the references to the statement that should be disregarded.

THE COURT: The jurors understand that?

Every one of the jurors is shaking his head in the affirmative. His testimony is to be considered by you. It is only the reference to a written statement that I asked you to erase.

Do you all understand that?

May the record reflect that each juror has shaken his and her head in the affirmative.

You may proceed with cross examination.

CROSS EXAMINATION

BY MR. AUSLANDER:

Q Mr. Stahl, when did you arrive in New York?

A I arrived in New York last Friday.

Q Where were you staying?

A I was staying in a motor vessel which was coming with papers and signed off in New York last Saturday to go home for a vacation.

Q Where have you been staying since Friday?

A The Downtown Athletic Club, Manhattan.

Q Were you speaking to Mr. Stearns on Friday?

A Speaking to Mr. Stearns Friday.

Q Did you speak to him on Saturday?

A No.

Q Sunday?

A No.

Q Monday?

A Yes.

Q At his office?

A Yes.

Q Did he go over with you the testimony of the plaintiff?

A No.

Q Did you read any part of it?

A No.

Q Did anyone else go over with you the testimony of the plaintiff?

A No.

Q Who is or what is Rederi A/B Saturnus?

A Rederi A/B Saturnus, Rederi belongs to Svea Lines, Stockholm.

Q And who did you say you are working for now?

A Svea Lines.

MR. STEARNS: Now, Captain --

MR. AUSLANDER: Just a moment, Mr. Stearns.

THE COURT: Who is your present employer?

THE WITNESS: Husaro.

THE COURT: Are they connected with Rederi Saturnus?

THE WITNESS: No.

THE COURT: Are they connected with Svea Lines?

THE WITNESS: Yes.

BY MR. AUSLANDER:

Q So you were working for Svea Lines in 1969?

A Right.

Q And you are still working for Svea Lines?

A No.

Q Is Husaro Shipping Lines a part of Svea Shipping Lines?

A No.

Q Did you just tell us in answer to the judge's question you are working for Svea Shipping Lines, which is a part of Salen?

MR. STEARNS: The word was "connected."

THE COURT: Why don't you rephrase the question, particularly in view of the witness' difficulty to

some degree with English?

Q Rederi A/B Saturnus, what is that company?

A It's a company that belongs to Svea Lines.

Q And Salem Shipping Company, who does that belong to?

A It's a company which is not owned by Svea Lines, it's a separate company. It doesn't have any connection with Svea Lines.

Q None whatsoever?

A No.

Q It is not a parent company?

A No.

Q Or a subsidiary?

A No.

Q How long were you first mate aboard this vessel, the Svensksund?

A The last time I was on board was around 18 months, 19 months before October, '68.

Q Eighteen or 19 months?

A Yes.

Q Were you on it before that time?

A Yes.

Q For how long?

A Together three and a half years, about.

Q Three and a half years?

A Yes.

Q So you know that vessel pretty well?

A I do.

Q And you have been walking all around it for three and a half years plus 18 months, at least?

A Yes.

Q How wide is the vessel from the port rail to the starboard rail? Do you have to look at this to refresh your memory?

A It is 12 meters.

Q How far is it from the front of the ship's house to the fantail, to the very rear?

A Please repeat the question.

Q How far is it from the front of the house to the very rear or stern of the ship?

A It's about 20 meters.

Q How wide is the poop deck?

A The poop deck, on top of the poop house, is seven meters.

Q Is this a guess or do you know that as a fact?

A 6.7 meters.

Q How long is the No. 2 hatch?

A No. 2 hatch--

MR. STEARNS: Your Honor, I will object to the whole line of questioning. We have a document in evidence that shows how long it is.

THE COURT: Overruled.

A The No. 2 hatch would be 12 meters or 13 meters.

Q How high is it from the main deck up to the pilothouse?

A Four and a half meters.

Q Do you know what I mean by top of the pilothouse?

A On top of the pilothouse, excuse me. It would be around seven meters.

Q Didyou have a logbook on the vessel?

A Yes.

Q What is a logbook?

A It is a book you should enter everything that happened on board a vessel.

Q Did you make an entry about this incident to Mr. Bernardini?

A No.

Q Was this a normal occurrence of what you claim you saw Mr. Bernardini do in your experience as a first mate? Yes or no.

A Yes.

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Q You mean you have seen this happen many times?

A No.

Q Let me ask you again --

MR. STEARNS: At this point I must interrupt. I think it is obvious we are having something of a language problem.

MR. AUSLANDER: We didn't have a language problem when you questioned him.

THE COURT: Let's have no colloquy back and forth. If you have an objection, make it.

MR. STEARNS: I would call to the court's attention what I believe is a language problem and I would ask that the court direct that the witness take his time answering, and if he does not understand, to please say so.

THE COURT: The witness seems to me to be an intelligent gentleman and I am sure if he is having trouble he will so state.

MR. TESTA: If your Honor please, Dr. Tagliagambe is here now.

THE COURT: Dr. Tagliagambe will have to wait.

Proceed, please.

Q I ask you, Mr. Stahl, whether this occurrence

that you testified to concerning Mr. Bernardini, is that a normal occurrence that you have experienced as a mate on ships?

A No.

Q Would you say that is a very abnormal or rare type of experience that you would be confronted with as a mate on a ship?

A Yes.

Q Did you think at the time that the man was a phony?

A Can I please --

Q Did you think at the time that the man was faking?

THE COURT: Do you understand what counsel is asking you?

THE WITNESS: No, not correctly.

Q Did you think at the time that the man was play acting?

A Yes.

Q Did you think at the time that this was play acting against your company?

A Yes, in one way.

Q Let me ask you this then: This abnormal or unusual occurrence, where you thought the man was play

acting, yet you made no entry in the ship's logbook concerning this incident?

A Repeat the question once more.

MR. AUSLANDER: May the reporter read it.

(Question read.)

THE WITNESS: I don't understand the question.

Q Even though you thought this man was play acting and you thought he was play acting against your company, you didn't make any entry in the official ship's log concerning this incident, is that not true?

A That is true.

Q All you did was call the ship's representative?

A Yes.

Q Isn't it a fact, Mr. Stahl, that any incident that is out of the ordinary is to be put as an official entry in the ship's log? Isn't that true?

A Yes, true. I have to do it.

Q That is all.

You have something similar to our Coast Guard in Sweden, don't you?

A No.

Q Do you have somethign similar to shipping regulations in Sweden?

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A Yes.

Q Shipping regulations call for the keeping of an official ship's log on the ship, isn't that true?

A It is true.

Q And in this official ship's log you are to make entries concerning the ship of anything that is unusual that happens, is that not true?

A That is true.

Q How high did you say the coaming was?

A Between three feet and three and a half feet.

Q That would be this high where my hand is?

A About this high only.

THE COURT: Indicating an area approximately at his waist.

Q And you say it is easy then to look over the side of the coaming?

A Yes.

Q You said on that morning the stevedores or the longshoremen had made a walkway so they can get over to the coaming and over to look over the rail, didn't you tell us that?

A I don't say they were doing that the same morning.

Q Whenever it was done was that the purpose of it?

A That was for the purpose of it, yes.

Q To make them be able to stand up higher to look over this three-foot wall, is that right?

A It could be.

Q How high were those pallets off the deck?

A About three inches high.

Q They are only three inches high?

A Yes.

Q Are those the usual type of pallets you have seen, three inches high?

A Yes.

Q How big are they?

A I think four inches, three inches high, four feet square.

Q Was that walkway there the day before?

A Yes.

Q How long was it there?

A The day before it was from 8 o'clock in the morning to 5 o'clock in the afternoon.

Q And it was there the next day, the date of October 28th?

A Yes, starting 8 o'clock in the morning.

Q These hatch covers that are on the hatch shown in Defendant's Exhibit D5?

A This is the hatch covers for hatch No. 4.

Q Are they closed at night?

A During the night time, yes.

Q And opened again in the morning?

A Yes.

Q On the right-hand side of the hatch covers as you look at the photograph, what are these little things?

A Wheels.

Q And that is so they can roll back and forth across the hatch, is that right?

A Right.

Q And they are oiled and greased to make them roll easier, aren't they?

A Yes.

Q Who does that oiling and greasing?

A The crew is doing that during the ship's voyage.

Q When did the ship come into New York before the 28h

A That I can't answer before looking at the logbook.

Q Meanwhile, would you please take this black pencil --

THE COURT: Some of the jurors indicate they

have difficulty understanding this.

The last question and answer, please, Mr. Kaufman.

(Record read.)

Q Would you take this black pencil and make a circle around the wheels that are oiled and greased?

A All right.

Q Do they have the same wheels on the other side?

A The same wheels on the other side.

Q And they are also oiled and greased?

A Yes.

MR. AUSLANDER: May I show this to the jury, please?

THE COURT: Yes.

(Pause.)

THE COURT: We are going to suspend with the testimony of Mr. Stahl at this time in view of the fact that at least one and perhaps two doctors are here and I have indicated to counsel at the earliest convenient moment we will take the testimony of the doctors out of turn, just as we did yesterday with the testimony of Dr. Graubard.

We will suspend now with the cross examination

of Mr. Stahl.

Mr. Stahl, you may step down.

And if either of you gentlemen is prepared to go forward with one or the other doctor, you may do so.

MR. TESTA: If your Honor please, this would be out of turn on the third-party defendant's case.

THE COURT: I understand.

(Witness excused.)

MR. TESTA: Dr. Tagliagambe.

THE COURT: This is, as has been indicated by Mr. Testa, out of turn. He is proceeding where he would normally wait until Mr. Stearns finished with his case. We are going to do this out of turn and I appreciate the jury's indulgence in this matter.

M A R I O F. T A G L I A G A M B E, called as a witness by third-party defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TESTA:

Q Are you duly licensed to practice medicine in the State of New York?

A I am.

Q For how long have you been so licensed?

A Since 1940.

Q What medical school did you graduate?

A New York Medical College.

Q Will you state your qualifications for the jury?

A At the present time I am full attending surgeon on the traumatic and orthopedist staff of the Columbus Hospital, New York City; on the orthopedic attending staff of Flower-Fifth Avenue Hospital and Metropolitan Hospital and assistant clinical professor of orthopedic surgery at New York Medical College.

Q On October 28, 1969 did you see Mr. Frank Bernardini, doctor?

A I did.

Q Under what circumstances and where did you see him?

A He was seen at the office following an accident that had taken place at one of the piers.

Q Did you take a history from him, doctor?

A I did.

Q What did he tell you?

A He stated that he had been working at the foot of 21st Street as a hold man; was walking on deck of loading ship to go down into hatch No. 4 --

MR. AUSLANDER: Just a moment. Are you reading somethimg?

THE WITNESS: Yes.

MR. AUSLANDER: I ask the court to direct the doctor to testify without reading, if he can.

THE COURT: Doctor, you are reading from something and I would ask you, putting the piece of paper to the side, if you have any independent recollection of the matters as to which you are now testifying?

THE WITNESS: I do not, sir.

THE COURT: I suggest that you mark the document from which the doctor was reading for identification, and of course he may refresh his recollection from that.

(Third-Party Defendant Exhibit A was marked for identification.)

MR. TESTA: May we approach the side bar?

THE COURT: Yes.

(At the side bar.)

MR. TESTA: There are all kinds of things attached here. This is not his report. I don't know who stapled all this.

MR. AUSLANDER: It is his records.

THE COURT: The point at this juncture is

this: You can question him. He can refer to anything to refresh his recollection. The question is, of course, what happens after that.

MR. TESTA: My point is he is reading from a specific report, all one of these documents and everything was clipped together. That is what I am saying?

THE COURT: What do you suggest?

MR. TESTA: We take them one at a time.

THE COURT: I am willing to do that.

MR. TESTA: I would like to unclip it.

THE COURT: You can do that as well . Just make sure all the counsel see the documents.

Take it up with Miss Kreuger now with counsel.

(In open court.)

Q Dr. Tagliagambe, your report of October 29, 1969 has been marked as an exhibit for identification.

Is that the report you were reading from when I asked you if Mr. Bernardini gave you a history?

A That is correct.

Q Will you continue to read from that and tell us what the history was that he gave you?

A While working at the foot of 21st Street on 10/28/69 as a hold man, walking on deck of loading

ship to go down into hatch No. 4, he stepped and tripped on pallets, falling forward and then to the right side, striking right shoulder on pallet.

Q Did he tell you that he slipped on oil and grease, Doctor?

MR. AUSLANDER: I will object to the form of the question.

THE COURT: Sustained as to form.

Q Is there anything in your report in connection with the history of how this accident happened which says that he fell on oil and grease?

MR. AUSLANDER: I object to the form of the question.

THE COURT: Sustained. You are still leading. That is the basis of the objection and I have to sustain it.

If you rephrase your question I will permit you to inquire.

Q Is there anything else in the history other than what you just read.

A There is not.

Q After you took this history from him did you conduct an examination of Mr. Bernardini?

A I did.

Q What did your examination consist of?

A The examination consisted of a thorough evaluation of the right shoulder in addition to x-rays of the shoulder followed by treatment.

Q Did you make any findings as a result of that examination of October 29, 1969?

A I did.

Q What findings did you make?

A I found contusions, sprained abrasions of the right shoulder region. X-rays of the right shoulder on 10/28/69 were negative of any fracture, dislocation or other traumatic pathology.

Q Did you recommend any treament for him?

A I did.

Q What treatment?

A Treatment consisted of the following: No. 1, local treatment of wounds, that is, cleansing of the area, followed by the application of a Furacin ointment dressing, and some medication was prescribed for him and the application of ice to the area was advised.

Q Did you see Mr. Bernadini after the first time you saw him?

A I did, yes.

Q When did you see him again?

A The next time was on 10/31.

Q I beg your pardon?

A 10/31.

MR. AUSLANDER: When was the first time you saw him.

THE WITNESS: 10/28 was the first time; then he was next seen on 10/29 and then 10/31.

Q Did you conduct an examination on those days?

A Yes.

Q What did your examination reveal?

A On the 31st he still had residual complaints referrable to the shoulder but on clinical examination --

MR. AUSLANDER: Just a moment. Are you telling us what your examination was of 10/29, which was the second date?

THE WITNESS: 10/31.

MR. AUSLANDER: I thought you said 10/28, 10/29 and 10/31.

THE WITNESS: That is correct.

THE COURT: What you are talking about now is what he said to you on the 31st.

MR. AUSLANDER: We are skipping the 29th.

THE COURT: Apparently.

Q Did you see him on the 29th?

A Yes.

Q Did you make any findings on that date?

A They were essentially the same on the 29th?

Q How about the 31st?

A On the 31st there was definitely clinical improvement noted on examination of the right shoulder.

Q Did you see him again after October 31st?

A I did.

Q When was the next time you saw him?

A 11/3.

Q November 3, 1969. What were your findings on that date?

A The findings were very minimal. I had already advised him to return to work as of 11/3/69.

Q Did you conduct an examination on November 3, 1969 of Mr. Bernardini's right shoulder?

A Yes.

Q What did that examination reveal?

A Objective findings were minimal, which means they were of a mild nature and that there had been clinical improvement since previous examination.

Q On November 3, 1969, in your opinion, was Mr. Bernardini able to go back to work?

rka Tagliagambe-direct

A It was my opinion he was able to return to work as of that date.

Q November 3, 1969, did he have any permanency of injury in so far as his right shoulder was concerned?

A I wouldn't even make an attempt to make a determination of that at that time.

Q Do you have a report, doctor, covering that examination of November 3, 1969?

A I do.

Q Under the question dealing with permanency did you make a finding as to whether there was a permanency or not a permanency?

A This question reads will there be, not whether there was on that date, and my answer to that was that I did not expect any permanent defect to come out as a result from this accident. In the future I did not expect any permanent defect to be present.

Q Are you familiar with the duties of a longshoreman, doctor?

A I am.

Q Do you know what the duties of a hold man are?

A I do.

Q When you examined Mr. Bernardini and treated him from October 28th and forward, did he tell you he was

a hold man?

A Yes, sir. It is in my history.

Q When you sent him back for work on November 3, 1969, was it your opinion that he could do the work of a hold man?

A Obviously it was.

Q Did you see him after November 3, 1969?

A I did.

Q Under what circumstances?

A Pursuant to an examination at the U. S. Department of Labor wherein certain recommendations were made further therapy was carried out and further x-ray studies were carried out.

Q By you?

A By me.

Q Did you see him for some period of time after that?

A He was seen until 12:1/69, sir.

Q During that period from November 3, 1969 to December 1, 1969 in your opinion was he able to work as a hold man?

A It was my opinion that he was, sir.

Q Did you see him after December 1, 1969?

A No, sir.

Q Was it your opinion that there was no permanency attached to this injury --

MR. AUSLANDER: I will object to the form of the question.

THE COURT: Sustained as to form.

Q Did you have an opinion with respect to permanency when you last saw him on November 1, 1969, doctor?

A Yes.

Q What was that opinion?

A It was my opinion he had none.

MR. TESTA: Thank you.

CROSS EXAMINATION

BY MR. AUSLANDER:

Q May I see your notes, please, doctor?

A Surely.

Q Doctor, did you make reference to these notes in your testimony that you just gave in answer to Mr. Testa's questions?

A I did, sir.

Q First of all, doctor, let me just ask you -- and let me give this back to you -- what was the charge for your first examination?

A $20.

Q And for the x-rays?

MR. STEARNS: At this point I will object to this. There has been no proper foundation laid.

MR. AUSLANDER: What kind of foundation do I have to lay?

THE COURT: Please. Overruled.

Q And for the x-rays?

A 17.25.

Q And you say that after he returned to you after November 3rdyou gave him further treatment?

A That is correct, sir.

Q What did this treatment consist of?

A Some deep form of radiant heat to the right shoulder.

Q Physiotherapy?

A It is within the realm of physiotherapy.

Q How many treatments did you give him?

A He was treated regularly, approximately three times a week until December 1st.

Q And would that be November 3rd, 5th, 7th, 10th, 12th, 17th, 19th, 21st, 24th, 26th and 28th and December 1st?

A That is correct, sir.

Q How much did you charge for that?

rka Tagliagambe-cross

A Whatever the charge they have there. I think it's 7.50 a visit. It's predicated on certain fixed fees.

Q The full total?

A $145.55.

Q That was for all the visits, all the treatment and two sets of x-rays?

A Yes, sir.

THE COURT: Did that include the $17.25 and the $20 mentioned before?

THE WITNESS: Yes.

Q The physiotherapy came to 94?

A It was corrected to 91. Apparently there was an error in addition that was picked up somewheres.

Q And you took another set of x-rays on November 28, 1969?

A That is correct.

Q And that was another 17.25?

A That is correct.

Q The full total of all the medical treatment rendered to him was $148 -- $145.50?

A That is correct.

Q Is that a fair and reasonable charge?

A It is.

rka Tagliagambe-cross

Q Doctor, when you first saw him you say a history was taken?

A That is correct.

Q As a matter of fact, Doctor, isn't it true that the history is taken by your secretary?

A It all depends how we are situated at the particular moment. It's always reviewed by me.

Q That is not what I asked you?

THE COURT: Can you tell us whether or not in this case you took the history or your secretary?

THE WITNESS: I took the history in this case. Either myself or my associate doctor with me. No nurse took the history or secretary took the history in this case.

Q Is this case so unusual for you, doctor?

A No. At that particular --

Q I was just asking if that was unusual.

A No.

Q You have a specific memory back to October 28, 1969 that you or your associate took the history?

A That is correct, sir.

Q How many people did you see that day, do you recall?

A That is not why I know that.

Q I didn't ask you that.

A I don't have any recollection of how many people I saw that day.

Q Would you say at least 20 that day?

A I have no recollection.

Q Of your best estimate, would you have seen 20?

A I have no recollection of that.

Q You have a very substantial practice, don't you, doctor?

A Well, that is relative.

Q Wouldn't you say that in the course of a day there will be some 20 or 25 longshoremen coming in for treatment or examination in any one working day that you have hours?

A It varies, sir.

Q Average 20 to 25?

A It's possible.

Q You are the doctor who treats the longshoremen for a great many, in fact most of the piers in Brooklyn, are you not?

A I don't know whether I am for most of them. For a good number of them.

Q A very large number?

A If you want to quibble over words. A good number or a large number, whatever you want to put it.

rka Tagliagambe-cross

Q Did you type up the report?

A No, sir.

Q What did you do when you took the history?

A It is given to a secretary at another location.

Q Orally?

A No.

Q You write it out?

A Right.

Q And you hand it to her?

A Right.

Q She types it up?

A Right.

Q And you wrote it in your own handwriting?

A Right.

Q You say here, "Loading ship to go down into hatch No. 4, stepped and tripped."

A That is correct, sir.

Q Could you just as well have written slipped and tripped and your secretary mistyped that?

MR. TESTA: Objection.

MR. AUSLANDER: Just a moment.

MR. TESTA: I am objecting to this line of questioning, whether he could have done this, that or something else.

THE COURT: Overruled.

Q Isn't it possible, doctor, that where you wrote "slipped and tripped" she typed "stepped and tripped"?

MR. TESTA: Objection.

THE COURT: Sustained. Anything is possible. Let's move on.

Q Doctor, you don't deny the fact that there could have been an error in copying, do you?

MR. TESTA: Objection.

THE COURT: Sustained.

Q Doctor, you were treating this man and he was sent to you by ITO, is that not correct?

A That is correct, sir.

Q So you are in common vernacular called the company doctor?

MR. TESTA: Objection.

THE COURT: Sustained.

Q Did the man come to you of his own choice or was he sent to you by the company?

MR.TESTA: Objection again, your Honor.

THE COURT: If you know.

A There is a panel of physicians. There was at that time in 1970 and he had a choice --

THE COURT: 1969.

rka Tagliagambe-cross

A He had a choice of one of the few doctors or one of the several doctors on that panel.

THE COURT: He could choose among the panel. He does not have a free choice of picking any doctor but within the panel, he does.

Q Doctor, he chooses or the company sends him over?

MR. TESTA: Objection. He just said the man has a choice.

THE COURT: It is cross examination.

Q Doctor, under common practice as you know it to be, isn't the man sent to you by the company, the time-keeper, whoever is at the pier?

MR. TESTA: Objection.

THE COURT: Sustained.

If you want to ask what happened in 1969 with this plaintiff I will permit you to inquire if the doctor knows. We don't want to know about other people at other times.

MR. AUSLANDER: It shows a pattern.

THE COURT: Let's find out what happened to this gentleman.

Q Do you know for a fact that Mr. Bernardini chose you out of a panel to go to when he was injured on

the pier and reported to the timekeeper?

A No, I do not, sir.

Q When you examined him you saw a contusion?

A That is the diagnosis I made based on all the factors present.

Q What is a contusion?

A It's a bruise.

Q And you also saw abrasions?

A Those are scratch marks on the skin.

Q More than just scratches, aren't they, doctor?

A I am trying to give you as close a lay terminology as I can for everybody to understand.

Abrasions are scratch marks on the skin.

Q I am asking you: aren't they more than just scratch marks?

A No, they are not.

Q Do they produce blood?

A It depends on the type of abrasion. Some of them produce a little drop of blood.

Q Was there any blood on this man's shoulder?

A I have no independent recollection right now.

Q Didn't you testify now, doctor, that you cleaned up his shoulder, local treatment of the wound?

A That is correct.

Q What does that mean?

A Cleansing of the area prior to putting a dressing on it.

Q Would it indicate that you were cleansing off blood?

A Not necessarily. It could be dirt. There was an abraded area so there probably was a little superficial oozing of blood in that particular scratch mark.

Q So we will concede then that there was some blood?

A Within that scope of understanding, yes.

Q And you put on some Furacin ointment dressing?

A Yes.

Q What is that for?

A It's an antibiotic-type dressing to try to maintain cleanliness in the wound and to prevent infection.

Q And you wouldn't put on an antibiotic unless there was an opening in the skin, isn't that correct?

A I said there was. There were abrasions in the skin.

Q Did you have a conversation with the man?

A Obviously to get a history there must be some

conversation.

Q Did you have any difficulty conversing with him?

A Not at all.

Q Did you notice anything about his speech patterns? Did he speak to you in American?

THE COURT: You mean English?

Q Did he speak to you in English?

A I don't recall whether he spoke to me in English or Italian, but whatever it was there was no language barrier.

Q Did you have any difficulty in understanding him at all?

A Not at all.

Q Did he have any impediment with his speech?

A As I recall, he does have some speech impediment but we were able to communicate.

Q Was he nervous?

A I don't recall, sir.

Q You gave him a mild sedation?

A For pain.

Q You also said you gave him medication?

A That was the medication.

Q Mild sedation for pain?

A Yes, sir.

Q Would it also be for nervousness?

A No, sir.

Q He was in pain?

A Yes, sir.

Q You saw him on the 29th, you said?

A I did.

Q And you told Mr. Testa what you found on the 29th?

A I did not. I told him what I found on the 31st.

Q Didn't you say on the 29th, sir, that your findings were basically the same?

A Yes, I did, you are right.

Q I am not trying to mislead you.

A I am sorry, I didn't mean that either. I remember testifying to the 31st. I think the 29th I said there was no central change.

MR. AUSLANDER: If your Honor please, this is Dr. Lodico. While I am cross examining Dr. Tagliagambe I would ask that Dr. Lodico leave the courtroom.

THE COUPT: I will authorize that that be done.

The doctor could either wait in the corridor

or go into the witness room. You have your choice.

MR. AUSLANDER: Thank you, your Honor.

BY MR. AUSLANDER:

Q On the 29th you say you examined him again and your findings were essentially the same as the 28th?

A That is correct.

Q But you don't have a report for that?

A I don't make reports for every day, sir; I make progress reports at intervals of two to three weeks as a rule unless some specific significant change takes place that warrants a report in between.

Q You told him he should go back to work on the 3rd?

A That is correct, sir.

Q Yet he came back to you for more treatment, isn't that correct?

A That is correct.

Q When he came back to you for more treatment was that as a result of having been examined at the United States Department of Labor?

A Some of that was, sir. Pursuant to that date it was? Prior to that date it wasn't.

Q I am talking about you sent back to work on November 3rd.

A That is correct.

Q When is the next time you saw him after you told him to report for work?

A After the 3rd was the 5th.

Q When was the next time after that?

A On the 7th.

Q Go on.

A The 10th, 12th, 19th.

Q When you saw him on these occasions did you feel that he needed the treatment you were giving him?

A For his subjective complaints, yes.

Q You made no objective findings?

A The objective findings were minimal, as I had testified to.

Q Did you know Dr. Magliato?

A Do I know him personally? No.

Q Do you know of him?

A I know who he is.

Q Who is he?

MR. STEARNS: Objection.

MR. TESTA: Objection.

THE COURT: Sustained.

MR. AUSLANDER: The doctor can't tell me who he is?

MR. TESTA: We have already been over this.

MR. AUSLANDER: I wasn't asking anything about that. I just want to know whether he knows him as a doctor.

MR. TESTA: I am objecting to that.

THE COURT: The objection is sustained.

BY MR. AUSLANDER:

Q Did you get a communique from the United States Department of Labor, Doctor?

A I did.

Q Directing more medical attention to be given to this man?

MR. TESTA: Objection.

THE COURT: Sustained. It is not the way to introduce that type of proof.

MR. AUSLANDER: I am not trying to introduce it.

THE COURT: Then don't.

MR. AUSLANDER: I would like this marked for identification, please.

(Plaintiff's Exhibit 1 marked for identification.)

Q Doctor, did you make use of this document to prepare yourself for this testimony today and also to